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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BOWDEN *v.* YOXALL.

C. A.
1900
Nov. 14.

[1900 B. 2598.]

Practice—Interlocutory Order—Leave to Appeal—Liberty of Subject—Refusal to Commit—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (*b*), (i.).

A judge having refused an application for the committal of the defendants on the ground of a breach by them of an undertaking which they had given to the Court, and having refused to give leave to appeal:—

Held, that the liberty of the subject was not concerned, and that an appeal could not be brought without leave, which the Court of Appeal refused to give.

APPEAL by the plaintiff from the refusal of Buckley J. to order the committal of the defendants for an alleged breach of an undertaking given by them to the Court. The learned judge refused to give leave to appeal.

The plaintiff appealed.

Levett, Q.C., and *Condy*, for the plaintiff.

Rowden, Q.C., *G. F. Hart*, and *Lynn*, for the defendants.

By virtue of s. 1 (*b*), (i.), of the Supreme Court of Judicature

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(Procedure) Act, 1894 (1), the appeal cannot be brought without the leave of the judge or of this Court. The liberty of the subject is not concerned, an order of committal not having been made. *Lancashire* v. *Hunt* (2) is the only authority on the point, and there North J. in a similar case thought that leave to appeal was not necessary.

When the discharge of a prisoner is granted on a writ of habeas corpus, there is no right of appeal. And, in the Chancery Division, a motion for the discharge of a person in custody is entitled to priority, but a motion to commit is not, and this is because the former concerns the liberty of the subject, while the latter does not.

Levett, Q.C., and *Condy*, for the plaintiff. The liberty of the subject is concerned, and therefore leave to appeal is not required. If necessary, we ask this Court to give leave.

RIGBY L.J. In my opinion the liberty of the subject is not concerned in this matter, and therefore leave to appeal is required. I do not see any reason for giving leave now.

VAUGHAN WILLIAMS and ROMER L.JJ. concurred.

Solicitors: *Wingfield & Blew; Baker & Nairne.*

(1) By s. 1 "No appeal shall lie .... (*b*) without the leave of the judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge, except in the following cases, namely (inter alia) (i.) where the liberty of the subject or the custody of infants is concerned."

(2) W. N. (1895) 52.

W. L. C.

In re LANGDALE (A LUNATIC).

C. A. 1900 Nov. 12, 16.

Lunacy—Jurisdiction of Master—Vesting Order—Trust Property—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116–130, 136—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 1.

A Master in Lunacy has not jurisdiction to make a vesting order as to trust property which, new trustees having been already appointed, remains vested in the old trustees, one of whom is a lunatic.

A vesting order in such a case is not part of the administration or management of the lunatic's estate within s. 27, sub-s. 1, of the Lunacy Act, 1891, which confers jurisdiction on a master.

In re Fuller, [1900] 2 Ch. 551, distinguished.

PETITION for a vesting order as to a sum of Consols which stood in the joint names of H. G. Langdale (who was of unsound mind) and George Manley, as trustees of a settlement. Langdale and Manley were appointed trustees in 1884, and the trust funds were then duly transferred to them.

In 1887 Langdale desired to retire, and Henry Stourton was, under the power contained in the settlement, appointed trustee in his place. All the property comprised in the settlement was then transferred to Manley and Stourton, except a sum of 430*l.* 11*s.* 3*d.* Consols which was forgotten, and that sum remained standing in the names of Langdale and Manley, the dividends being received by bankers under a power of attorney, and placed to the credit of Langdale and Manley.

In 1896 Langdale became of unsound mind, and on June 18, 1896, a committee of his person and a committee of his estate were appointed.

On October 19, 1896, Henry Stourton died, and on September 28, 1900, Auberon Stourton was, under the power, appointed trustee in his place.

The petition was presented by Manley and Auberon Stourton, and it asked (1.) that the right to transfer or to call for a transfer of the Consols might vest in the petitioners; (2.) that the right to sue for and recover the moneys standing at the bankers to the credit of Langdale and Manley might vest in the petitioners.

C. A. 1900

LANGDALE (A LUNATIC), *In re.*

The petition was served on the committee of the estate.

The petition came before the master, and he referred to one of the judges in Lunacy the question whether he had jurisdiction to make the order. The judge referred the matter to the Court.

H. M. Humphry, for the petitioners. It is submitted that by virtue of s. 27, sub-s. 1 (1), of the Lunacy Act, 1891, the master

(1) By s. 116 of the Lunacy Act, 1890, "(1.) The powers and provisions of this part of this Act relating to management and administration apply (inter alia):—

"(*a*) To lunatics so found by inquisition;

"(*b*) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act;

"(*c*) To every person lawfully detained as a lunatic though not so found by inquisition."

"(2.) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge."

"(4.) The powers of this Act relating to management and administration shall be exercisable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic."

Sect. 128: "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power, or give the consent in such manner as the order directs."

Sect. 129: "Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case

has jurisdiction to make the vesting order. In *In re Fuller* (1) it was held that the master, when appointing a person to exercise a lunatic's power of appointing new trustees, could at the same time make an order vesting the trust property in the new trustees when appointed. It would be strange if, when the master has power to make the larger order, he should not have power also to make the lesser order—a simple vesting order—when the trustees have already been appointed. The making of a vesting order in the present case is as much a matter of "administration and management" within the meaning s. 27, sub-s. 1, as was the making of the order in *In re Fuller*. (1) Those words are not necessarily co-extensive with the words "Management and Administration" which head the group of ss. 116–130 of the Lunacy Act, 1890; they may include more. The Bank of England must obey the order of the Court: *In re Shortridge* (2), which also shews that s. 129 extends to trust property. To obtain a transfer from the lunatic of trust property of which he is still a trustee, though he has ceased to be a trustee of the settlement, must be an act of "administration."

[RIGBY L.J. It is not administration of the lunatic's estate.]

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under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees."

[The group of ss. 116–130, both inclusive, is headed "Management and Administration."]

Sect. 136: "(1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

"(2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons."

[The group of ss. 133–143, both inclusive, is headed "Vesting Orders."]

By the Lunacy Act, 1891, s. 27, "(1.) Subject to rules in Lunacy the jurisdiction of the judge in Lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the judge in Lunacy."

(1) [1900] 2 Ch. 551.

(2) [1895] 1 Ch. 278.

C. A. 1900 LANGDALE (A LUNATIC), *In re.*

In *In re Fuller* (1) it was held that "administration" extended to trust property. The power of the Court to make vesting orders under the Trustee Acts has been much enlarged by recent legislation: *In re M.* (2)

Cur. adv. vult.

Nov. 16. RIGBY L.J. The question is whether a vesting order can be made by the master under the circumstances of the present case. [His Lorship stated the facts, and continued:—] Independently of the Act of 1890, I am unable to come to the conclusion that the making of a vesting order under such circumstances is any part of the "administration" or "management" of the lunatic's estate, and therefore primâ facie the words of s. 27 of the Act of 1891, which give jurisdiction to the master, do not apply. I agree that, if we found such an order treated in the Act of 1890 as a matter of administration or management, we must regard it as within s. 27, sub-s. 1. *In re Fuller* (1) was cited to us as an authority, shewing that the master has jurisdiction to make the order now asked for. In my opinion, that case does not justify us in so holding. I think that there the ratio decidendi was that the Court found in the Act words actually giving jurisdiction to the master to make the order. That order was to be made under s. 129 of the Act of 1890, which forms one of the group of sections headed "Management and Administration," and therefore it came in terms within s. 27 of the Act of 1891. The jurisdiction to made a vesting order is statutory, and before the master can make such an order some words must be found which confer a statutory jurisdiction upon him. It is strange that neither when *In re Fuller* (1) was before this Court, nor on the hearing of the present case, was the important authority *In re Browne* (3) brought to our attention.

It could not have been present to Mr. Humphry's mind when he addressed his argument to us, but he has very properly referred us to it since. We had, however, before he did so, considered that case, though I must confess that it was not

(1) [1900] 2 Ch. 551. (2) [1899] 1 Ch. 79.
(3) [1894] 3 Ch. 412.

present to my mind when I took part in the decision of *In re Fuller* (1) or during the argument of this case. *In re Browne* (2) was decided by Lindley, Lopes, and Davey L.JJ. An order had been made by a master for the appointment of a receiver of the dividends of some stock which belonged to a lady, "who through mental infirmity arising from age was incapable of managing her affairs." The Bank of England objected to act upon that order, on the ground that the master had no jurisdiction to make it; but the Court held that he had. From what the judges said, it is quite clear that we may assume that the words "administration and management" in s. 27 of the Act of 1891 are not limited to the matters dealt with by ss. 116–130 of the Act of 1890. Lindley L.J. said (3): "The power to appoint a receiver is clearly a power relating to 'management and administration,' and, although not specially mentioned in the group of sections so headed, is within the general words with which s. 116 commences. This being so, the power can be exercised by a master, and it need not be exercised by a judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a master had jurisdiction to make a vesting order under ss. 133 et seq. of the Lunacy Act, 1890; and, after carefully examining the Acts and Rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly." And Davey L.J. said (4): "I think that the Act means what it says, and that all powers and provisions relating to 'management and administration' which are found in Part IV. of the Act are included," that is, in s. 116, sub-s. 1.

It is plain, therefore, that s. 27 of the Act of 1891 is not confined to the specific powers of "management and administration" which are conferred in the group of ss. 116–130 in the Act of 1890, and if we can find any power of management or administration outside that group the master would, by virtue of s. 27 of the Act of 1891, have jurisdiction to exercise it. I am, however, satisfied that the order for which this

(1) [1900] 2 Ch. 551.
(2) [1894] 3 Ch. 412.
(3) [1894] 3 Ch. 417.
(4) Ibid. 419.

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petition asks (which would be made under s. 136, sub-s. 2) cannot properly be described as an order for the administration or management of the lunatic's estate; and, if that be so, the master has no jurisdiction to make it. We have been urged not merely to follow *In re Fuller* (1), but to extend it. In that case it was held that an express power to do the very thing asked for was contained in the group of sections headed "Management and Administration," and that, therefore, it came within s. 27, sub-s. 1, of the Act of 1891. But it by no means follows that a power which is not included in any of that group of sections comes within s. 27, sub-s. 1. If it is a power of "management" or "administration" it will do so, but not otherwise. In my opinion, therefore, the power to make the vesting order which is now asked for cannot be exercised by the master.

VAUGHAN WILLIAMS L.J. I agree.

ROMER L.J. I also agree.

Solicitors: *Gribble, Oddie & Co.*

(1) [1900] 2 Ch. 551.

W. L. C.

C. A.
1900
Nov. 7, 8.

In re WHITAKER.
WHITAKER *v.* PALMER.

[1898 W. 2749.]

Administration—Insolvent Estate—Creditors—Priorities—Voluntary Debt—Bankruptcy Rule—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-s.* 4.

The effect of s. 10 of the Judicature Act, 1875, is to introduce into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary creditors are to be paid pari passu with creditors for value.

Decision of Cozens-Hardy J., [1900] 2 Ch. 676, affirmed.

In re Maggi, (1882) 20 Ch. D. 545, and *Smith* v. *Morgan*, (1880) 5 C. P. D. 337, disapproved.

Appeal against the decision of Cozens-Hardy J. (1)

In the administration by the Court of the estate of a testator, whose estate was insolvent, the trustees of a voluntary settlement claimed to prove for a sum of 5000*l.* which the testator had thereby covenanted to pay to them, with interest thereon, and for arrears of an annuity which he had also covenanted to pay. The testator's creditors for value opposed the claim, on the ground that voluntary debts ought to be postponed to debts contracted for value.

Cozens-Hardy J. held that by s. 10 of the Judicature Act, 1875, the rule in bankruptcy, that voluntary debts are to be paid pari passu with debts for value, has been introduced into the administration of insolvent estates by the Chancery Division, and that the old rule in Chancery which postponed voluntary debts to debts for value has been superseded.

The creditors for value appealed.

Eve, Q.C., and *E. Ford*, for the appellants. The main object of s. 10 (2) was to abolish the distinction which then

(1) [1900] 2 Ch. 676.

(2) By s. 10, "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities

C. A. 1900 WHITAKER, *In re.* WHITAKER *v.* PALMER.

existed between Chancery and bankruptcy as to the right of proof of a secured creditor. In Chancery a secured creditor could prove for his whole debt without valuing his security: *Mason* v. *Bogg* (1); whereas in bankruptcy he was obliged to value his security and prove only for the balance of his debt. If Cozens-Hardy J. was right in his view of the decision of this Court in *In re Leng* (2), s. 10 has introduced into the administration of an insolvent estate all the rules of bankruptcy with regard to the distribution of the estate, except in the case of a judgment creditor, which was dealt with by Fry J. in *In re Maggi* (3) and by Lindley J. in *Smith* v. *Morgan*. (4) In *In re Maggi* (3) it was decided that s. 10 deals only with the rights of the class of secured creditors as against the class of unsecured creditors, and not with the rights of the members of those classes inter se. This is the natural interpretation. It is admitted that those rules of bankruptcy which enlarge the bankrupt's estate are not introduced by s. 10 into the administration in Chancery. The words "as to debts and liabilities provable" in s. 10 mean the debts and liabilities which can be proved, and do not refer to the order in which they are to be paid. Sect. 10 does not deal with the distribution of the estate —that is still governed by the old Chancery rules. Some limitation must be placed on the words of s. 10. *In re Leng* (2) did not go so far as Cozens-Hardy J. thought. The decision depended upon s. 3 of the Married Women's Property Act, 1882, the effect of which is to postpone the right of a wife, who has lent money to her husband for the purpose of his trade or

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and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

(1) (1837) 2 My. & Cr. 443; 45 R. R. 111.

(2) [1895] 1 Ch. 652.

(3) 20 Ch. D. 545.

(4) 5 C. P. D. 337.

business, to a dividend in his bankruptcy to the claims of his other creditors for value. And it was held that s. 10 of the Judicature Act, 1875, introduced this enactment into the administration of the estates of deceased insolvents. But Lindley L.J. did not in his judgment treat *In re Maggi* (1) as inconsistent with his then decision. The decision in *In re Heywood* (2), that rates and wages are entitled to priority in the administration of the estate of a deceased insolvent, depended upon s. 1 of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62). In *In re McMahon* (3) Stirling J. said (4) that "by s. 10 of the Judicature Act, 1875, the rules as to debts and liabilities provable which are in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt regulate the admissibility of the claim." It is submitted that that is the right construction of s. 10.

[VAUGHAN WILLIAMS L.J. In bankruptcy a postponed creditor is not allowed to prove at all until the preferred creditors have been paid in full. But when a creditor is entitled to the benefit of the Preferential Payments in Bankruptcy Act of 1888, the other creditors are allowed to prove, notwithstanding his preference.]

Sub-s. 6 of s. 1 of that Act, which provides that the section "shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order," would be unnecessary if s. 10 of the Judicature Act applies to the bankruptcy rules which govern the distribution of the estate.

Vernon Smith, Q.C., and *S. B. L. Druce*, for the trustees, were not called upon.

W. E. Capron, for the executors.

RIGBY L.J. The question is whether in the administration of an insolvent estate in the Chancery Division the old and undoubted rule of the Court of Chancery, that creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration, must,

(1) 20 Ch. D. 545.
(2) [1897] 2 Ch. 593.
(3) [1900] 1 Ch. 173.
(4) Ibid. 177.

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Rigby L.J.

notwithstanding s. 10 of the Judicature Act, 1875, still prevail. In my opinion we cannot so hold.

Sect. 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words, I think they do not simply deal with the proof of debts. The same rules are to prevail "as to debts and liabilities provable." I cannot read those words as meaning simply "as to the proof of debts and liabilities." I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery. Now undoubtedly in bankruptcy (it does not matter how it came about) the rule as to debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank pari passu. I think we should be cutting down unduly the plain words of s. 10 if we were to allow the old rule of the Court of Chancery to override in the present case the existing rule in regard to bankruptcy. If ever that rule should be altered, it would of course be a different matter. I do not suggest that it ought to be altered; but it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan* (1) and *In re Maggi* (2), I can only say that we are not bound by those decisions, and if and so far as it is necessary (which probably means altogether) we must overrule them.

VAUGHAN WILLIAMS L.J. I agree. I do not think that s. 10 is very artistically drawn, or that it is very easy to construe. Perhaps that is the reason why the decisions on the section are not very easy to reconcile. Speaking for myself, I should have thought that the decision of the Court of Appeal in *In re Leng* (3) was absolutely inconsistent with the decision of Fry J. in *In re Maggi*. (2) But Lindley L.J. in his judgment in *In re Leng* (3) seems expressly to take the view that the two decisions are reconcilable, though I do not quite understand it.

One thing is quite clear, namely, that the section does not

(1) 5 C. P. D. 337. (2) 20 Ch. D. 545. (3) [1895] 1 Ch. 652.

mean that in all respects the results of a bankruptcy, and the consequent administration of the estate, and the results of the death of an insolvent and the consequent administration of his estate, are to be absolutely identical. It was long ago decided that, notwithstanding s. 10, you must still apply only in bankruptcy those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons. So far it is plain that there is intended to be a distinction between bankruptcy and the consequent administration and death followed by administration of the insolvent estate of the deceased. The section itself seems to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively." The section specifies four heads as to which uniformity is for the future to prevail. And, in my view, we have in construing it to determine what are the limits of the four heads specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail.

It seems to me that this rule of Chancery administration comes under the first of the four heads—namely, the rule in bankruptcy "as to the respective rights of secured and unsecured creditors." In my opinion, if those words are properly read, they do not mean, as Fry J. in *In re Maggi* (1) assumed that they do, only the respective rights of the two classes of creditors, secured and unsecured, as against each other, but that they include also the respective rights of those two classes inter se, and there can be no doubt that, as regards the rights of the creditors inter se, the rule in bankruptcy differed from the rule in Chancery. In bankruptcy, once given a provable debt, all the debts proved were entitled to payment of dividend pari passu. In Chancery a voluntary debt might be proved, but as regards payment of dividend it would be postponed to the creditors for

(1) 20 Ch. D. 545.

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value. It seems to me that under that section the rights of the creditors inter se must now be regulated by the bankruptcy rule, and not by the old Chancery rule.

For these reasons I agree with Rigby L.J.

ROMER L.J. I also agree. The important words in s. 10 for the purposes of this appeal are, I think, those which provide that the bankruptcy rules "as to the debts and liabilities provable" shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules "as to debts and liabilities provable." It appears to me that, if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule "as to" that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but pari passu with them, that would be a rule "as to" those debts.

This has, I think, been decided in principle by the Court of Appeal in *In re Leng* (1); and in my opinion that case cannot properly be distinguished in the way which has been suggested on the present appeal. *In re Maggi* (2) can, I think, no longer be regarded as an authority. The attention of Fry J. when he decided that case was not directed to, and he did not in his judgment deal with, those words of s. 10 which formed the basis of the decision in *In re Leng* (1), and which form the basis of our present decision.

RIGBY L.J. The appeal will be dismissed with costs.

Solicitors: *Ridsdale & Son; Gamlen, Burdett & Gamlen, for Cottrell & Son, Birmingham; Belfrage & Co., for Chaldecott, Dorking.*

(1) [1895] 1 Ch. 652. (2) 20 Ch. D. 545.

W. L. C.

KEKEWICH J.

1900

May 15.

In re BOND.
PANES *v.* ATTORNEY-GENERAL.

[1896 B. 2397.]

Crown—Bona Vacantia—Escheat—Legal Devise to one for Life with no Devise over—Death of Testator without Heirs—Sale under Settled Land Acts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 22, *sub-s.* 5.

Land was devised by an owner in fee simple to one for life with no devise over. The testator died in 1882, without an heir. The land was sold by the tenant for life under the powers of the Settled Land Acts, and a fund representing the proceeds of sale remained in the hands of trustees appointed for the purposes of the Acts. On the death of the tenant for life:—

Held, that the fund was a money fund which vested in the Crown as bona vacantia.

Taylor v. *Haygarth*, (1844) 14 Sim. 8, distinguished.

Adjourned Summons.

The testator, E. V. C. Bond, who died on January 19, 1882, made his will, which was dated February 25, 1879, in the following terms: "Whatever property I may possess at the time of my decease shall be enjoyed by my dear wife Ann Bond during her life," and the testator appointed the Rev. W. W. Rowley and Mr. John Panes executors and trustees of his will. The will contained no gift in remainder over after the death of the testator's wife, nor any residuary devise or bequest.

Ann Bond survived the testator, and on November 8, 1888, upon her application, the trustees of the will were appointed by the Court trustees of the settlement created by the will for the purposes of the Settled Land Act, 1882.

In 1889 and 1892 the widow, Ann Bond, in exercise of the powers conferred on her as tenant for life under the Settled Land Acts, sold certain freehold hereditaments in the parish of Weston-super-Mare, which formed part of the testator's estate, and the proceeds of the sale were paid to the trustees.

The widow, Ann Bond, died on August 6, 1895.

In answer to inquiries directed by the Court upon the application of the trustees, the master, on November 17, 1899, certified that no person had come in and established a claim to

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be the heir-at-law or next of kin of the testator, and that the time fixed for advertisement for such purposes had expired.

This was a summons taken out by the trustees, to which the Attorney-General was made defendant, asking for a declaration that the trustees were beneficially entitled to the capital moneys arising from the sale under the Settled Land Acts of the freehold hereditaments above mentioned, together with all accumulations of income.

One of the trustees having died since the summons was taken out, there was now in the hands of the plaintiff, John Panes, the sole surviving trustee, a sum of money amounting to about 1900*l.*, representing the proceeds of sale of the land, and immediately derived from the conversion by the trustees of securities upon which the actual proceeds had been invested.

Warrington, Q.C., and *O. L. Clare*, for the plaintiff. The Crown is not entitled to this fund either (*a*) under the law of escheat, or (*b*) as bona vacantia. The title of the Crown by escheat is not derived from the Royal Prerogative, but accrues to the Crown as paramount lord of the land, and only in default of a tenant to perform services incident to tenure. Thus, previously to the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), there was no escheat of trust estates: *Burgess* v. *Wheate*. (1) Here, at the death of the tenant for life, the land had become vested in the purchasers, and therefore escheat of it was impossible, and there can be no escheat of money, which is not the subject of tenure.

It may be said that the Crown is entitled to any personal estate of which there is no owner, and that the title of the trustee is not sufficient to oust the right of the Crown. But the doctrine of bona vacantia does not apply to personalty arising from the sale of realty, but only to the "bona" of an intestate, i.e., to property which in its origin was the goods of a person, and possibly also of a dissolved corporation.

Again, the Crown can have no equity to alter the condition of the property at the time when the escheat arises: *Walker* v. *Denne*. (2)

(1) (1759) 1 Eden, 177. (2) (1793) 2 Ves. Jr. 170; 2 R. R. 185.

[*Ingle Joyce.* That is not disputed.]

Neither the law of escheat nor the doctrine of bona vacantia applies to proceeds of sale of real estate: *Taylor* v. *Haygarth.* (1) That case is a twofold authority. It shews that in the present case although, as between the persons claiming under the settlement, there may be a right under the Settled Land Act to have this money laid out in land, the Crown, not being a person claiming under the settlement, can have no right to insist on such a reconversion in order to take by escheat or otherwise. It also shews that where money has arisen from land the Crown cannot take it as bona vacantia, because the next of kin, if any, of the deceased owner of the land could not. *Middleton* v. *Spicer* (2) goes no further, and is explained in *Taylor* v. *Haygarth* (1) as being applicable only to personal estate, and not to proceeds of sale of real estate. *Cradock* v. *Owen* (3) is to the same effect as *Taylor* v. *Haygarth.* (1) It is true that here there is not, as there was in *Taylor* v. *Haygarth* (1), any devise in trust for sale; but that is not material to this point, namely, that the money arises from real estate, and therefore cannot be bona vacantia. The right of the Crown to bona vacantia was elaborately discussed in *Dyke* v. *Walford* (4), and the ground of the right is clearly shewn to be that if personal chattels are without an owner, as by reason of a failure of next of kin of the deceased owner of them, the Crown takes them by the prerogative. See also *Barclay* v. *Russell.* (5) The case of *In re Higginson and Dean* (6), where the law as to bona vacantia was dealt with by Wright J., had reference to the goods of a corporation, and the learned judge had not present to his mind the exception in *Taylor* v. *Haygarth* (1), which was cited to him in argument, but is not referred to in his judgment, and *Cradock* v. *Owen* (3), though referred to in the judgment, is not noticed so far as it relates to real estate. *In re Higginson and Dean* (6), therefore, is only another illustration of the right of the Crown to goods.

(1) 14 Sim. 8.
(2) (1783) 1 Bro. C. C. 201.
(3) (1854) 2 Sm. & Giff. 241.
(4) (1846) 5 Moo. P. C. 434, 487.
(5) (1797) 3 Ves. 424, 430; 8 R. R. 162, n.
(6) [1899] 1 Q. B. 325.

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[KEKEWICH J. I see that the Divisional Court in that case gave leave to appeal.

Ingle Joyce. The appellants withdrew.]

The effect of s. 22, sub-s. 5, of the Settled Land Act, 1882, is to stamp this money with the character of land. It is land which would pass to the heir-at-law of the deceased and not to his next of kin, and it cannot therefore be bona vacantia.

Ingle Joyce, for the Crown. This claim, apart from technical argument, is simply a claim by the trustee of a money fund to retain it because there is no beneficial owner forthcoming. No justification for such a claim is to be found in the books. The trustees never had the land in any shape or form. They were simply trustees appointed under the Settled Land Acts for the behoof of the tenant for life, and to hold the money until it was reinvested in land. If the money were laid out in land the legal estate would not be in the trustees, but in the tenant for life, with remainder to the heir if there were one. I say, therefore, that the fund belongs to the Crown as bona vacantia.

If and so far as s. 22, sub-s. 5, of the Settled Land Act, 1882, applies, it assists the claim of the Crown. If the money, by force of the Act, is to be treated as if it were actual land, the trustees would have nothing whatever to do with that land, which would belong to the heir-at-law, if any, and if none to the Crown by escheat.

The argument on the other side appears to treat the doctrine of bona vacantia as limited to something which from the beginning of time has been personal estate. There is no authority for that. Nor is there any authority which limits the doctrine to pure personal estate. Whenever there is a failure of the cestui que trust of chattels, real or personal, the beneficial interest, like all other bona vacantia, vests in the Crown by the prerogative.

Taylor v. *Haygarth* (1) was an entirely different case from the present one. The legal estate was in the trustees, and there was a trust for sale which could not be enforced by any one; and the fact that the trustees did sell was a mere accident which could not vary rights. In *Cradock* v. *Owen* (2), as in

(1) 14 Sim. 8. (2) 2 Sm. & Giff. 241.

Taylor v. *Haygarth* (1), the trustees were not bound to sell. They might have paid the legatees, without selling, and all the Court held was that the accidental circumstance that they did in fact sell made no difference. Those two cases are merely instances of the application of *Burgess* v. *Wheate*. (2) *Middleton* v. *Spicer* (3), so far as it is in point, is an authority in favour of the Crown.

This is a personal money fund in the hands of a trustee, and the right of the Crown to it is the same as in *In re Higginson and Dean* (4) and *Cunnack* v. *Edwards*. (5)

It is to be observed that the answer of the master to the inquiry is not that there is no heir, but that no heir has come in. That is sufficient for the Crown claiming as bona vacantia, though it might not be for a subject claiming by escheat.

It is by no means clear that the Crown is bound by the sale under the Settled Land Acts. But the Crown desires to confirm the sale, and the point is only mentioned in order that it may not be overlooked.

[KEKEWICH J. I have difficulty in seeing how the trustees can, merely by virtue of a sale of land under the statute, acquire a title to money which otherwise would never have been theirs.]

Warrington, Q.C., in reply. The answer to that observation of the Court is to be found in s. 22, sub-s. 5, of the Act of 1882. That section only gives the money to the persons entitled under the settlement. The Crown is bound by the sale because the right to take by escheat is subject to alienation by the tenant for life under the Act. For the purposes of the Act (see s. 2, sub-s. 2) the interest resulting to the settlor is an interest under the settlement. The whole case turns on s. 22, sub-s. 5, which makes this money land, so that (the settlor having died before the Intestates Estates Act, 1884) the principle of *Burgess* v. *Wheate* (2) applies.

KEKEWICH J. The Court is here dealing with a fund which represents the proceeds of sale of land under the powers of

(1) 14 Sim. 8.
(2) 1 Eden, 177.
(3) 1 Bro. C. C. 201.
(4) [1899] 1 Q. B. 325.
(5) [1896] 2 Ch. 679.

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the Settled Land Act, 1882. Mr. Ingle Joyce on behalf of the Crown says that, although the Crown is willing to confirm the sale, he must not be understood as admitting that the sale was good in law as against the Crown. On the other hand, I must not be understood as intimating that the sale was otherwise than good. There was in this will a legal devise to the tenant for life and nothing more. The result of that was that under the Act, subject only to the appointment of proper trustees for the purposes of the Act, the tenant for life could make a good title to a purchaser. She did sell, trustees having been first duly appointed, and it seems to me that, under the circumstances, the sale must be good, both against the Crown and against anybody else. The point, however, has not been argued here, and I must not be taken to have given any decision upon it. The result, then, is that the land has been converted into money, but the money is liable to reconversion into land—that is to say, any one interested under the settlement is entitled to have it reconverted into land, and according to the Act it devolves in the same way as land actually purchased would devolve. The trustees were appointed simply for the purposes of the Settled Land Acts, and received the money only as trustees for those purposes; they had no interest or estate in land whatever. They say, however, "The money now belongs to us because it is really equivalent to land, and that being so the Crown cannot get the money if claimed by escheat except by reconverting it into land, and there is no equity or power on the part of the Crown to get that done." It is conceded on the part of the Crown that that is so, and there can be no question whatever about it. But to my mind the real difficulty arises from the Settled Land Act, 1882, itself, which says, in s. 22, sub-s. 5, "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution be considered as land"; and the section proceeds to say: "And the same"—that is to say, the capital money, not the land—"shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts

as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement"; and the words "under the settlement" under s. 2 of the Act (sub-s. 2) comprehend any "estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir." The result is here that, the tenant for life being dead, the money is held on trust for the testator's heir, and as there is no heir to the testator, that seems to me to let in immediately the claim of the Crown without any question of reconversion. The Crown claims it in its present state as money, and says, "You shall not reconvert it at all; it is money which belongs to the Crown." That seems to me to be quite consistent and in agreement with all the cases cited, including *Taylor* v. *Haygarth* (1), which was especially relied on by Mr. Warrington in his argument. In that case there was a distinct direction to sell, and to stand possessed of the proceeds on trust for persons not defined by the will, and not named in any codicil; and that makes it an entirely different case from the present one. Here there is no direction for sale, and the money is in the hands of trustees as money until reconverted into land, and the Crown, instead of requiring it to be reconverted, claims the money itself as being money which would belong to the testator's right heir if he had one, but which in default of an heir belongs to the Crown as bona vacantia. I must, therefore, decide in favour of the Crown. There will be a declaration that the Crown is entitled to the fund as bona vacantia. The applicants, the trustees, will have their costs as between solicitor and client, and retain them with their charges and expenses properly incurred as trustees, and they will pay the residue of the fund with any interest accrued and to accrue thereon to the Crown account or as the Commissioners for the Treasury shall direct.

Solicitors: *Meredith, Roberts & Mills, for Baker & Co., Weston-super-Mare; Hare & Co., for the Solicitor to the Treasury.*

(1) 14 Sim. 8.

COZENS-HARDY J.

1900

Oct. 30, 31; *Nov.* 1, 10.

NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL.

[1899 N. 1107.]

Inclosure—Unallotted Land—Adjoining Owner—Lord of the Manor—Prescription—Profit a Prendre—Pasturage—Surveyor of Highways.

An Inclosure Act provided for the allotment of land to the lord of the manor in compensation for all right of soil:—

Held, that the soil of land set out as a private road in pursuance of the Act was vested in the allottees of the adjacent land ad medium filum.

The herbage of a road was by an inclosure award made in 1822 allotted to the surveyor of highways to be let for depasturing sheep, in aid of rates. For more than fifty years the surveyor had let the pasturage for cattle and horses. The Court presumed an enlargement of the right to depasture by grant or release from the owners of the soil to the surveyor.

THIS was the trial of an action relating to the herbage on a private road called Moor Road, set out by commissioners in pursuance of an Act (52 Geo. 3, c. cxliii.) intituled "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building and endowing a church for such parish."

The plaintiff sued as occupier of a farm in Newborough abutting on Moor Road; the defendants were the rural district council of Peterborough, in the capacity of surveyor of highways of Newborough, and T. H. Vergette, their tenant of the pasturage of Moor Road, against whom the action had been discontinued.

The facts as stated by the judge were: By the Newborough Inclosure Act of 1812 the Borough Fen Common and the Four Hundred Acre Common were dealt with substantially in the manner usually adopted in Inclosure Acts. Commissioners were appointed who were directed (inter alia) to set out certain roads, and it was enacted by s. 21 that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should

allot and award the same. By s. 26, one-twentieth part of the land was to be allotted to the lord of the manor in respect of his right to the soil, and by s. 27 such allotment was to be had and taken in lieu full bar and compensation for all rights of soil in the said open common or waste land therein directed to be divided and inclosed. (1) The award under this Act was made in 1822. It set out a large number of roads, public and private, amongst others "one private carriage, bridle, and drift road and footpath distinguished by the name of Moor Road of the breadth of forty feet." By the award all private roads were to be kept in repair by and at the expense of the owners and proprietors of lands and estates in Borough Fen Common and the Four Hundred Acre Common, in such shares and proportions as they by law were or thereafter would be liable to contribute to the repair of the public roads. The award provided that all the grass and herbage which should from time to time grow and arise upon all the private roads set out and thereinbefore awarded should belong to and be the property of the surveyor for the time being of the highways to be appointed for the said common and waste land called Borough Fen Common and the Four Hundred Acre Common, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same. And that such rent or rents should be annually paid and applied towards defraying the charges and expenses of maintaining and keeping in repair the said public and private roads. It has not been argued before me that this restriction upon the mode of dealing with the herbage was beyond the powers of the commissioners, and I therefore assume its validity. The plaintiff is the occupier of a farm, allotted under the award, on one side of the Moor Road, from which it is separated by a ditch, with a low hedge on the farm side of the ditch. It is established by evidence that the herbage on the several highways has been annually let by auction. The precise terms of letting immediately after the

(1) The language of the Act is applicable to several lords of several manors; but it was afterwards judicially established that the Marquis of Exeter was lord of the manor of the whole area the subject of the Act.

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award cannot be ascertained; but the evidence satisfies me that at least since 1846 the roads, including Moor Road, have been let publicly by auction, year by year, pursuant to directions given at public vestry meetings, without any restriction providing for the depasturing of sheep only. On the contrary, the conditions have provided a limit varying from time to time as to the number of cattle or horses which might be grazed upon Moor Road. The conditions usually provided that the hirer of Moor Road might hang a gate next Thorney Road, and this was regularly done. It is further proved that the plaintiff has himself been party to many such lettings, and has himself hired Moor Road upon these terms, and grazed cattle thereon, and received money paid by others for the right of turning cattle thereon during his tenancy. In 1899 the defendants, the rural district council, who are the successors of the surveyor of the highways, let Moor Road by auction to the defendant Vergette upon conditions, of which the following alone are material: 4. That not more than six horses nor more than twelve beasts shall be allowed to graze on any road at one time, under a penalty of 5*s*. for every head of stock above the number, and if any stock be found on any of the roads without a tender, such stock shall be deemed trespassers, and be impounded accordingly. 5. That no swine or geese shall be allowed to graze on any of the said roads. 6. That if any scabbed sheep or diseased or entire cattle be found grazing upon any of the said roads or highways the owner thereof shall forfeit and pay to the district council of Peterborough the sum of 10*s*. for every such animal. The defendant Vergette turned horses and cattle in excess of the prescribed number into Moor Road, and without a tender. It is alleged that damage was done to the ditches, which the plaintiff or his landlord is bound to repair; and, further, that the cattle and horses trespassed upon the plaintiff's land and injured his corn. The defendant Vergette has paid 40*s*. damages, and the action has been discontinued against him. The defendant council have paid 40*s*. into court with a denial of liability. The plaintiff now seeks an injunction to restrain the district council from grazing or depasturing horses, cattle, or stock other than healthy sheep in or upon Moor Road.

Rawlins, Q.C., and *Percival*, for the plaintiff. The defendants can only claim pasturage under the terms of the Act; they cannot lawfully exercise a greater right. A right of prescription is set up. The surveyor of highways for the time being was not a body corporate and could not prescribe. The soil of the road was not expressly allotted; it therefore remains in the lord of the manor: *Poole* v. *Huskinson* (1); *Reg.* v. *Inhabitants of East Mark Tything.* (2) At any rate, it cannot be vested in the surveyor.

Eve, Q.C., and *Schiller*, for the defendant council. The action is wrong in form; the plaintiff cannot sue a public body in respect of the wrongful exercise of a statutory duty as a private individual: the Attorney-General ought to have been plaintiff.

The soil of Moor Road, if not vested by implication in the surveyor, is not vested in the lord of the manor, but in the allottees of the adjoining land: *Haigh* v. *West* (3), the lord having been fully compensated by the allotments to himself.

There having been a very long enjoyment, as of right, of the pasturage for cattle and horses for the benefit of the ratepayer, the Court will presume a grant in favour of trustees for the benefit of the ratepayers from the owner of the soil: *Haigh* v. *West* (3); *Brown* v. *Dunstable Corporation* (4); *Goodman* v. *Saltash Corporation.* (5)

The plaintiff has himself taken an active part in the past in the alleged wrongful depasturing cattle; he is not in a position to complain.

Rawlins, Q.C., in reply. That the Attorney-General is not a party is no objection to an action by an individual in respect of special injury to himself: *Cook* v. *Bath Corporation* (6); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (7); *Spencer* v. *London and Birmingham Ry. Co.* (8); *Sampson* v. *Smith* (9); *Stockport*

(1) (1843) 11 M. & W. 827.
(2) (1848) 12 Jur. 332.
(3) [1893] 2 Q. B. 19.
(4) [1899] 2 Ch. 378.
(5) (1882) 7 App. Cas. 633.
(6) (1868) L. R. 6 Eq. 177.
(7) [1892] 3 Ch. 242.
(8) (1836) 8 Sim. 193; 42 R. R. 159.
(9) (1838) 8 Sim. 272.

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District Waterworks Co. v. *Manchester Corporation* (1); *Liverpool Corporation* v. *Chorley Waterworks Co.* (2)

[*Eve, Q.C.*, referred on this point to *Glossop* v. *Heston and Isleworth Local Board* (3); *Price* v. *Bala and Festiniog Ry. Co.* (4)]

The facts do not require, and the evidence falls short of what is requisite to raise, the presumption of a lost grant. The origin of the power of letting the herbage is known, and what has taken place has been simply an excess in the exercise of a limited leasing power. Further, assuming the suggested grant to have been made, it must be taken to have been made to the churchwardens and overseers as trustees for the parish: 59 Geo. 3, c. 12, s. 17. And the successors of the churchwardens and overseers are the parish council and not the defendant council, who are the successors of the surveyor of highways only: Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6, sub-s. 1 (*c*), (iii.), and s. 25, sub-s. 1.

Cur. adv. vult.

Nov. 10. COZENS-HARDY J. (after stating the facts). These facts being admitted or proved, several questions arise for my decision. In the first place, it is by no means clear in whom the soil of the road is now vested. It may be vested in persons claiming under the Marquis of Exeter, in whom the soil of the common was vested at the date of the award, on the ground that it is not allotted to any one else. This seems to have been the view of Parke B. in *Poole* v. *Huskinson* (5), where he says, dealing with a similar road: "As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." A different view was, however, expressed by the Court of Appeal in the recent very similar case of *Haigh* v. *West* (6), where Lindley L.J., in delivering the considered judgment of the

(1) (1862) 9 Jur. (N.S.) 266.
(2) (1852) 2 D. M. & G. 852, 860.
(3) (1879) 12 Ch. D. 102.
(4) (1884) 50 L. T. 787.
(5) 11 M. & W. 830.
(6) [1893] 2 Q. B. 29.

Court, used the following language: "Having regard to the fact that the allotments to the lord and to the owners of the common fields and to the commoners were expressly made in satisfaction of all their respective former rights not expressly reserved to them, the soil in the lane set out would not remain in its former owners, but would primâ facie pass to the allottees of the land abutting on the lane; the allotments on each side extending to the middle of the lane, although described as bounded by the lane." Having regard to ss. 26 and 27 of the Inclosure Act, I think I must hold that the soil of Moor Road became vested in the owners of the adjoining allotments, including that of which the plaintiff is the occupier, subject only to a right of way and to the right of the surveyor of the highways to the herbage thereon. This being so, I am relieved from considering some of the arguments addressed to me as to the right of a private individual to maintain an action to enforce the performance by a public body of a statutory obligation. It seems to me that the plaintiff must be entitled primâ facie to assert that the land of which he is in occupation ought not to be subjected to any greater burden than was imposed upon it by the award.

Assuming this to be the legal position immediately after the award, has anything happened to change it? It is plain that an owner of land subject to a limited right may enlarge that right or release any restrictions upon the exercise of that right. Now I find an open and regular and unchallenged dealing with the herbage of this road, and similar roads, for more than fifty years in a manner and to an extent not authorized by the award. The depasturing of horses and cattle was apparently to the advantage of the owners and occupiers of the allotted lands. More money was obtained for the repair of all the parish roads. The plaintiff himself recognised this advantage, for he took an active part in letting the herbage, and moreover himself stocked the road with horses and cattle. Some justification or explanation of these acts ought to be discovered, a lawful origin ought to be presumed from the long usage, and I think I must presume a lost grant by the owners of the soil of the road by virtue of which the surveyors were released

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from the restrictions imposed by the award as to the mode of grazing. The case of *Haigh* v. *West* (1) above referred to is a strong authority in support of this presumption. The result is that, in my opinion, the action fails, and must be dismissed with costs.

Solicitors: *Clarke, Rawlins & Co., for Percival & Son, Peterborough; J. Matthew Voss, for J. W. Buckle, Peterborough.*

D. P.

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1900
Nov. 6, 16.

JOHNSON *v.* BRAGGE.

[1899 J. 1866.]

Marriage Settlement—Mistake—Non-execution of a Power—Death of Donee—Rectification—Parol Evidence—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

In an action to rectify a settlement after the death of the husband, on the ground that it did not exercise a certain power of appointment in favour of the wife, in accordance with the arrangement alleged to have been entered into prior to the marriage, the defendants pleaded the 4th section of the Statute of Frauds; they also contended that relief could not be given against a non-execution, as distinct from an imperfect execution, of a power, and particularly after the death of the donee thereof:—

Held, that parol evidence was admissible in an action to rectify a mistake in a settlement, notwithstanding the Statute of Frauds, an action of that kind not being one seeking "to charge any person upon any agreement made upon consideration of marriage" within the meaning of s. 4; that relief could be given, and that rectification in the present case did not amount to aiding the non-execution or defective execution of a power; when once the settlement was made to accord with what the Court found to have been the real bargain and intention of the parties to it, no further deed or relief was necessary.

ACTION.

Two somewhat novel defences were raised to this action for rectification of a marriage settlement—namely, (1.) that under s. 4 of the Statute of Frauds parol evidence was not admissible to rectify the alleged mistake, and (2.) that the Court could not aid the non-execution of a power, as distinct from an imperfect execution, after the death of the donee of the power. The

(1) [1893] 2 Q. B. 19, 29.

facts, and the result of the evidence, as found by the Court, were as follows :—

In July, 1865, one John Walter Hawkesworth, in contemplation of an intended marriage with the plaintiff, then Miss Eliza Madeline Florence Dowler, wrote to his solicitor, Mr. William Rowcliffe, asking for information as to his present and future means and prospects to lay before the lady's father, and for advice and guidance as to the nature of the settlement he ought to execute.

In reply, Mr. William Rowcliffe wrote to John Walter Hawkesworth a letter, dated July 21, 1865, which, so far as is material, was as follows :—

"I have now carefully looked into the documents, and am enabled to answer your letter of the 16th.

"(1.) Under your grandfather's will, you will be absolutely entitled, on the death of your mother, to one-fourth of his estate, after deducting 5000*l.*, which was given as a portion by your grandfather on his marriage.

"This sum may be estimated in round figures at 4000*l.*

"Under the same will, you will also probably become entitled to considerable parts of the shares of your three aunts; this, however, depends upon the periods of deaths of several parties, so that no estimate can be made.

"(2.) Under the settlement which was executed the other day, you will be entitled for your life, on the death of your father and mother, to funds amounting together to about 7000*l.*, and this deed gives you a power to settle the income on your wife after your death for her life, and to give the capital among your children as you may think fit. Failing your children, you may give it as you please.

"Supposing you marry, I think you may fairly give the lady a life interest in the latter fund, and I think you should settle all the personal property which you may derive under your grandfather's will in the same way, namely :—

"On yourself for life.

"After your death on your wife for life.

"After the death of the survivor, on your children. And failing these, you may give it to whom you may think fit.

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"I have, of course, only stated the property to which you are absolutely entitled; but the lady's father should distinctly understand that your expectations under your grandfather's will are very considerable, but as they are subject to contingencies they cannot of course be treated as certain.

"I shall be very glad to see you and explain the matter more fully to you, which can be done more satisfactorily at an interview than by letter, and, if this explanation is not quite intelligible and satisfactory to you, I hope you will talk it over with me before you shew it to the lady's father."

"The settlement which was executed the other day" was a post-nuptial settlement, dated December 9, 1864, under which J. W. Hawkesworth, subject to the life interest therein of his father and mother, was entitled to the income of the trust funds thereby settled for his life, with power by deed or will to appoint a life interest to any wife who might survive him, and subject thereto the trust funds were settled upon J. W. Hawkesworth's children as he should by deed or will appoint, and in default for his children at twenty-one or marriage.

The evidence as to the negotiations for the settlement, as given by the plaintiff, the only survivor of the parties to the transactions, and as accepted by the Court, was that the plaintiff and her father and mother, and J. W. Hawkesworth, had several conversations at the Vicarage, Aldeburgh, where the lady's parents resided, in the course of which the father asked whether J. W. Hawkesworth could settle anything on marriage. He said he did not know, but he would write to his family solicitor, Mr. Rowcliffe. At a subsequent meeting J. W. Hawkesworth produced Mr. Rowcliffe's letter of July 21, with which the lady's father seemed very pleased. J. W. Hawkesworth said he would settle about 11,000*l.*, coming as to 7000*l.* from his parents' marriage settlement, and as to 4000*l.* from his grandfather's will. There was a long talk with the lady's father and mother about it. A solicitor, a friend of the family who was now dead, was then staying at Aldeburgh, and the plaintiff's father brought him up to the Vicarage and read him over Mr. Rowcliffe's letter in the presence of J. W. Hawkesworth, the plaintiff, her mother, and her brother. He was

asked as a friend to prepare the necessary document. The plaintiff's father and mother said they would settle, so far as they could, certain property as to which no question was raised in this action. The plaintiff was to have the income of all during her widowhood. The solicitor friend took Mr. Rowcliffe's letter away, prepared a document, brought it up to the Vicarage next day, and left it for the purpose of being read. He came again another day with a second witness. It was signed by all parties at the same time. The solicitor friend said it was a settlement of J. W. Hawkesworth's 11,000*l.* on the plaintiff. It was read over and explained. The solicitor friend stated that the settlement was made on the instructions in Mr. Rowcliffe's letter.

The settlement, which was entirely in the handwriting of the solicitor friend and was under seal, was in the form of articles of agreement.

This instrument was dated August 5, 1865, and made between John Walter Hawkesworth of the first part, the Rev. Henry Turner Dowler and Frances Harriet Emma Dowler, his wife, of the second part, and the plaintiff, then and therein described as Eliza Madeline Florence Dowler, of the third part. After reciting that a marriage had been agreed upon and was intended to be forthwith solemnized between the said John Walter Hawkesworth and the plaintiff, and that in contemplation thereof, and with a view of providing for the said John Walter Hawkesworth and the plaintiff and their offspring, it had been mutually agreed and arranged by and between the parties to the said articles in manner following, it continued: "The properties subject to this agreement and to be subject to and included in the more formal settlement hereby agreed and intended to be made shall consist on the part of the said John Walter Hawkesworth of two several sums of money to which he is entitled under the will of his maternal grandfather John Walmesley after and subject to the life interests of his father and mother or of one of them therein and which sums are now estimated to amount to and for the purposes of this agreement and of the settlement to be hereafter made as aforesaid shall be taken as not exceeding the sums of 4000*l.* and 7000*l.* respectively." On

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the part of the plaintiff such properties were to consist of certain sums therein referred to to which the plaintiff was entitled as therein mentioned; and the said Henry Turner Dowler and Frances Harriet Emma Dowler, her parents, agreed to settle and thereby settled the same accordingly. And it was thereby agreed that the property of the said John Walter Hawkesworth should be settled upon trust for himself for his life, and after his decease upon trust for the plaintiff for her life, and, subject as thereinbefore mentioned, both the properties of the said John Walter Hawkesworth and of the plaintiff should be settled upon their children and issue in such shares and proportions, and to such one or more exclusive of the others or other of them, and on such conditions and generally as the said John Walter Hawkesworth and the plaintiff should by deed or deeds with or without power of revocation jointly appoint, or as the survivor should by deed or will appoint, and in default of appointment among the children and issue equally as tenants in common, the issue of any deceased child to take only the share to which their parent would have been entitled, and no issue to take the parents' share or any share during the parents' lifetime. And that if there should be no child or issue of the said intended marriage who should live to attain twenty-one years, or, if a daughter, that age or be married, then (inter alia) that the property of the said John Walter Hawkesworth should go and belong to him, his executors, administrators, and assigns. And it was further agreed that the trustees of the said settlement should be such persons as the said John Walter Hawkesworth and the plaintiff should, notwithstanding their intended marriage, jointly appoint, with power for them jointly, or the survivor of them, or the trustees or trustee for the time being after the death of the survivor of them, to nominate new trustees or a new trustee as occasion might require, and that the settlement should contain powers of advancement, maintenance, and education, and of investment as therein mentioned.

The marriage took place on August 7, 1865. No further settlement was ever executed pursuant to the articles; but in 1891 J. W. Hawkesworth and the plaintiff, on the occasion of

the marriage of one of their daughters, appointed one eighth of the trust property in her favour after the decease of the survivor of J. W. Hawkesworth and the plaintiff; and in 1898 J. W. Hawkesworth and the plaintiff appointed trustees of the settlement, and appointed that the remaining seven eighth parts of the property subject to the settlement should, from and after the death of the survivor of J. W. Hawkesworth and the plaintiff, be held for the remaining seven children in equal shares. J. W. Hawkesworth died in 1898, leaving eight children who attained twenty-one. His father and mother predeceased him. Shortly after the death of J. W. Hawkesworth doubts were raised as to the proper construction of the settlement, and in particular whether the plaintiff was entitled to a life interest in the 7000*l.* coming from the settlement of December 9, 1864. The contingent interests referred to in Mr. Rowcliffe's letter did not prove as valuable as was then expected, and there was not 7000*l.* under the grandfather's will in addition to the 4000*l.* By an order made by North J. on April 26, 1899, on an originating summons (*In re Walmesley, Medlicott* v. *Bragge*, [1898 W. 3835]), the Court declared that the whole of the share of the said J. W. Hawkesworth under the will of John Walmesley not exceeding 11,000*l.* was bound by the settlement of August 5, 1865, and the Court declared that the settlement of August 5, 1865, did not operate as an exercise of the power of appointment contained in the settlement of December 9, 1864, in favour of the widow. Under these circumstances the plaintiff (who had married a second time) commenced this action, seeking to rectify the settlement so as to give her a life interest in the 7000*l.* comprised in the settlement of December 9, 1864. The defendants were the trustees, and the children of the marriage, or persons claiming under them. Some of the defendants disputed the plaintiff's claim; others did not contest it.

One of the defendants expressly pleaded the Statute of Frauds, s. 4, as a defence.

Vernon Smith, Q.C., and *Gatey*, for the plaintiff. Sect. 4 of the Statute of Frauds does not apply to an action for rectification;

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the plaintiff does not seek "to charge any person upon any agreement made upon consideration of marriage"; parol evidence is, therefore, admissible to shew the real intention of the parties, so that the mistake made in carrying out this intention may be rectified. The Statute of Frauds has never been pleaded in any action for rectification before. Rectification does not depend on any of the doctrines specially applicable to powers; and if it did, this is not a case of non-execution. Non-execution of a power is where nothing has been done; here there was an intention to execute, only it was not properly carried out, so that at the most it could only amount to defective execution: *Shannon* v. *Bradstreet.* (1) Rectification only makes the deed what it was originally intended to be; the Court is asked to insert a few words referring to the power of appointment by the intended husband, and then the deed of August, 1865, executes the power and carries out the original intention of the parties. No further deed is necessary. The plaintiff's evidence clearly proves what the real intention of the parties was.

Eve, Q.C., and *R. J. Parker*, for some of the defendants. There is no agreement here signed by the intended husband to execute this power: the Statute of Frauds is a good defence, and parol evidence is not admissible to correct the alleged mistake.

[COZENS-HARDY J. Has the Statute of Frauds ever to your knowledge been successfully pleaded as a defence to an action for rectification?]

We know of no reported case where it has been expressly raised in the pleadings. Though not pleaded, the statute was considered in *Olley* v. *Fisher* (2); it is, however, distinctly pleaded in this case, and it is a good defence.

This is a case of non-execution of a power, as distinct from an imperfect or defective execution of a power; the donee of the power is now dead, and the Court cannot aid the non-execution of the power now: *Tollet* v. *Tollet* (3); Farwell on Powers, 2nd ed. pp. 333, 335. Rectification in this case in effect amounts to the execution by the Court of a non-executed power

(1) (1803) 1 Sch. & Lef. 52, 62; 9 R. R. 11.

(2) (1886) 34 Ch. D. 367.

(3) (1728) 2 P. Wms. 489.

after the death of the donee, a thing which has never been done before.

[*Palmer* v. *Locke* (1) was also referred to.]

E. Ford, for another defendant, took no part in the argument.

Curtis Price, for another defendant, adopted the argument of the first defendants, and also relied on the acquiescence and laches on the part of the plaintiff in not coming earlier for relief, and contended that there was no evidence of any error or mistake on the part of the husband, or sufficient evidence of intention on the part of the husband to exercise this power, and referred to *Fowler* v. *Fowler*. (2)

Vernon Smith, Q.C., in reply. This is not a question of non-execution or defective execution of a power: it is a question of making the deed carry out the proved intention of the parties.

[COZENS-HARDY J. referred to *Morgan* v. *Milman*. (3)]

There is no reported case in which the Statute of Frauds has ever been pleaded as a defence to an action for rectification.

[*Duke of Bedford* v. *Marquess of Abercorn* (4) was also referred to.]

Cur. adv. vult.

Nov. 16. COZENS-HARDY J. This is an action seeking rectification of a marriage settlement under somewhat peculiar circumstances. [His Lordship having stated the facts and the result of the evidence as above, observing that the plaintiff gave her evidence in a manner which satisfied him that she was a witness of truth, and that he accepted her statements as to what took place, continued:—]

Now, I am satisfied by the evidence that it was intended by all parties that the settlement should operate in favour of the plaintiff upon the two sums of 4000*l.* and 7000*l.* mentioned in Mr. Rowcliffe's letter, and that the power of appointment which Mr. Hawkesworth possessed over the 7000*l.* should be exercised by the settlement, and that all parties thought it had been exercised thereby, and that Mr. Hawkesworth died in this belief, but that a mistake was made by the solicitor

(1) (1880) 15 Ch. D. 294.
(2) (1859) 4 De G. & J. 250, 265.
(3) (1853) 3 D. M. & G. 24.
(4) (1836) 1 My. & Cr. 312, 330; 43 R. R. 200.

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friend who treated the 7000*l.* as coming from the same source as the 4000*l.* This being so, I think I ought to rectify the settlement, unless I am prevented by reason of two objections which were strenuously urged before me. In the first place the Statute of Frauds is pleaded, and it is contended that a marriage settlement cannot be rectified on parol evidence. In the second place it is contended that, as North J. has decided that the power of appointment was not exercised, the Court, according to well-settled rules, cannot give relief against a non-execution, as distinct from an imperfect execution, of the power.

Now the plea of the Statute of Frauds somewhat surprises me, for the books are full of cases in which marriage settlements and conveyances of land have been rectified on parol evidence. But I was told that the Statute of Frauds had not been pleaded in those cases, although it might have been. The reason why the Statute of Frauds was not pleaded in modern cases is because it was settled at least a century and a half ago that parol evidence is admissible in an action to rectify a mistake in a marriage settlement, notwithstanding the Statute of Frauds: an action of that kind not being one seeking "to charge any person upon any agreement made upon consideration of marriage" within the meaning of s. 4. In *Thomas* v. *Davis* (1), decided in 1757, the bill was to rectify a mistake in a conveyance. The evidence of the attorney who received the instructions to prepare the deed, and did prepare the deed, was held admissible, though in that case not sufficient. Sir Thomas Clarke says: "The objection is, that it is a direct contradiction to the Statute of Frauds, but I am clear it may be read. Parol evidence is admitted for several purposes. It is allowed to rebut an equity. It is often admitted to prove an original fraud or mistake." See also *Rogers* v. *Earl.* (2)

In *Alexander* v. *Crosbie* (3), which was a suit to rectify a settlement, Sir E. Sugden says (4): "In all the cases, perhaps,

(1) (1757) 1 Dick. 301, 303.

(2) (1757) 1 Dick. 294; Sugden's Vendors and Purchasers, 14th ed. p. 172.

(3) (1835) L. & G. t. Sugden, 145; 46 R. R. 183.

(4) L. & G. t. Sugden, 150.

in which the Court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach." See also *M'Cormack* v. *M'Cormack*. (1)

In Story's Equity Jurisprudence, 13th ed. s. 158, it is laid down that "the exceptions to the rule" (rejecting parol evidence to contradict written documents) "originating in accident and mistake have been equally applied to written instruments within and without the Statute of Frauds."

In my opinion the Statute of Frauds is not a valid defence.

As to the second objection, I am unable to appreciate its force. The instrument of August 5, 1865, is under seal. No further deed will be required. The deed, when rectified by inserting the few words needed to correct the blunder made by the solicitor friend, will be a perfectly valid appointment. The jurisdiction I am asked to exercise does not depend upon any doctrine peculiar to powers. When once the deed is made to accord with what I find to have been the real bargain and intention of all parties to it, no further relief will be needed.

The result is that I must grant the relief asked by the plaintiff. I shall declare that the deed of August 5, 1865, was, in the particulars hereinafter specified, executed under mistake, and that the deed ought to be rectified by reading the same as if in the recital, after the words "under the will of his maternal grandfather John Walmesley," there had been added the words "and of the settlement made by his parents dated the 9th of December, 1864, respectively"; and I shall order a copy of this declaration to be indorsed on the settlement.

The costs of all parties of this action must be taxed and paid out of the trust estate.

Solicitors: *Skewes-Cox, Nash & Co.; Arkcoll, Cockell & Chadwick; Nye, Moreton & Clowes, for J. K. Nye & Treacher, Brighton.*

(1) (1877) 1 L. R. Ir. 119.

W. C. D.

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Nov. 21, 28.

In re COWLEY.

[1900 C. 2175.]

Practice—Infant—Management of Land during Minority—Appointment of Trustees—Infant taking by Descent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 42, *sub-s.* 1.

Sect. 42, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking by descent.

In re Glover, [1899] 1 I. R. 337, followed.

ADJOURNED SUMMONS.

This was an ex parte application by the mother and guardian of an infant for the appointment of trustees under and for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881, which raised the question whether that section included the case where an infant took by descent.

The infant had become entitled in fee simple in possession to certain real estate, as the heir-at-law of a deceased great-uncle, who had died intestate since the Land Transfer Act, 1897, had come into operation, and of whose estate the mother of the infant had been appointed administratrix.

There was evidence that the personal estate had been administered, and the debts paid.

The application was made by originating summons, which was entitled in the matter of the real estate of James Henry Cowley, an infant (describing it), and "In the matter of the Conveyancing and Law of Property Act, 1881," and asked "That pursuant to s. 42, sub-s. 1, of the above Act two proper persons may be appointed trustees for all the purposes of that section, or such of the same purposes as the Court shall think fit, and that the persons so appointed may be at liberty to enter into and to continue in possession of the above-mentioned real estate, and all other if any the real estate to which the said infant is by descent or otherwise entitled, and to manage the same during his minority and to apply the income thereof and

lay out the residue thereof in the manner provided by the above Act"; and, when amended as eventually ordered, continued; "And that the same persons may be appointed to exercise the powers by the Settled Land Acts conferred on tenants for life under the settlement on behalf of the infant during his minority in respect of all and singular the above-mentioned real estate."

H. Fellows, for the applicant. There is no reported decision in this country on this point, and text-writers differ as to the application of s. 42, sub-s. 1, to land coming to an infant by descent. Hood and Challis on Conveyancing and Settled Land Acts, 5th ed. p. 112, state that the language of this section points only to the case of infants taking under a settlement, and cannot be extended to include infants taking by descent; but Wolstenholme on the Conveyancing and Settled Land Act, 8th ed. p. 98, says this section includes the case where an infant takes by descent, and this is the view adopted in *In re Glover* (1), which seems precisely in point except that the mother, as administratrix, having cleared the estate, is now a trustee for the infant under the Land Transfer Act, 1897, s. 2, sub-s. 1, and may hold this land in trust for the infant within the meaning of s. 43 of the Conveyancing Act, 1881: *In re Smith* (2), though I believe she would be willing to disclaim her rights, if any.

COZENS-HARDY J. directed the application to stand over for a disclaimer to be obtained from the widow.

Fellows mentioned the matter again and produced a formal disclaimer by the widow of "the office of trustee whether by virtue of the Land Transfer Act, 1897, or otherwise"; he also asked that, as some portion of the realty consisted of building land and the minority was likely to be a long one, the summons might be amended by entitling it in the matter of the Settled Land Acts.

COZENS-HARDY J. held, following *In re Glover* (1), that s. 42, sub-s. 1, applied to the case where an infant took land by

(1) [1899] 1 I. R. 337. (2) (1889) 42 Ch. D. 302.

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descent; he said he should have hesitated to make an order adversely to the mother's right, as guardian or otherwise, but as she now disclaimed he felt no difficulty in making the order as asked by the summons when amended by being entitled in the Settled Land Acts.

Solicitors: *E. Carleton Holmes & Son.*

W. C. D.

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1900
Dec. 5, 6.

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GIBSON *v.* GIBSON.

[1900 C. 886.]

Marriage Settlement—Ultimate Trust in Default of Children of the Marriage "for all and every the Child and Children or Grandchild" of A. living at the Death of the Survivor of the Husband and Wife—Children and Grandchildren of A. living at the Period of Distribution.

A trust in a marriage settlement of certain stocks and securities for the benefit of the husband and wife and the children of the marriage, and in default of children (which event happened) then, upon the death of the survivor of the husband and wife, "for all and every the child and children or grandchild of A." living at the death of the survivor of the husband and wife.

The husband survived the wife, and died in January, 1900. A. had thirteen children, of whom eight survived the husband and five died in his lifetime, four unmarried, and one leaving an only child:—

Held, that "or" was not to be read "and," and, there being children of A. living at the period of distribution, no grandchild took a share.

ADJOURNED SUMMONS.

Under and by virtue of an ante-nuptial settlement, dated December 20, 1853, and made between Henry Coley of the first part, Marion Pink of the second part, and William Edward Gillett and John Gibson (trustees) of the third part, certain stocks, funds, and securities, amounting to 4350*l.*, became vested in the trustees upon certain trusts therein mentioned for the benefit of Henry Coley, his wife, and the children of the marriage, and in default of any child or children of the marriage (which event happened), then in trust "for all and every the child and children or grandchild of Julia Gibson, the

wife of the said John Gibson (party hereto), living at the decease of the survivor of the said Henry Coley and Marion Pink, his intended wife."

Henry Coley survived his wife, and died on January 14, 1900.

Julia Gibson had thirteen children, of whom eight survived Henry Coley and were still living, and five died in his lifetime, four of them without ever having been married, and one leaving an only child.

The question was whether the cestuis que trust included (1.) grandchildren of Julia Gibson living at the period of distribution, issue of children of Julia Gibson living at the same period, so that such grandchildren took in competition with their parents; (2.) a grandchild of Julia Gibson living at the period of distribution, issue of a child of Julia Gibson who died prior to such period.

Mulligan, Q.C., and *Gurdon*, for the plaintiff (an unmarried daughter of Julia Gibson). There is no case in which the word "or" has been read "and" in a deed. *Margitson* v. *Hall* (1) is a case in favour of not so reading it in a deed. In the present case the gift is to classes as joint tenants in the alternative, and each class is exclusive of the other: *Holland* v. *Wood* (2); *Amson* v. *Harris*. (3)

Christopher James, for a grandchild of Julia Gibson whose parents were living. The word "or" should be read "and." The grandchildren form part of the class to take: *Eccard* v. *Brooke*. (4) If that is not so, then the grandchildren whose parents are alive take equally with those whose parents died before the period of distribution.

Hon. Frank Russell, for another grandchild (the child of a child of Julia Gibson who died before the period of distribution). The contingency of surviving the period of distribution applies both to the original and substituted classes. That being so, the gift must be construed as substitutional: *Congreve* v. *Palmer* (5): *Atkinson* v. *Bartrum*. (6)

(1) (1864) 12 W. R. 334.
(2) (1870) L. R. 11 Eq. 91.
(3) (1854) 19 Beav. 210.
(4) (1790) 2 Cox, 213; 2 R. R. 31.
(5) (1852) 16 Beav. 435.
(6) (1860) 28 Beav. 219.

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Levett, Q.C., and *Stewart-Smith*, for other parties, and *Stokes*, for the trustees, took no part in the argument on this point.

Mulligan, Q.C., in reply. The cases cited are all cases of tenants in common, and do not apply to joint tenants. The survivors of the class of children take all.

Cur. adv. vult.

Dec. 6. BYRNE J. In this case a question of construction arises upon the terms of a certain settlement made on the marriage of Henry Coley with Miss Marion Pink. In the events which have happened, the following trust has come into operation: "In trust for all and every the child and children or grandchild of Julia Gibson, the wife of the said John Gibson (party hereto), living at the decease of the survivor of them the said Henry Coley and Marion Pink, his intended wife."

I have already decided that grandchildren cannot take in competition with their parents. The clause has been read, and I think rightly, by everybody as though the word "grandchild" were equivalent to "grandchildren or grandchild."

Three contentions have been raised. First, it is said that no grandchildren can take if there are children living at the period named for ascertaining the class; secondly, that grandchildren of a child predeceasing that period take the share their parents would have taken if living; and, thirdly, that all grandchildren, even though their parents be living, must take amongst them the share which any deceased child would have taken.

Now, the word "or" in this settlement, I think, must be construed as "or," and I think that the class of grandchildren is a substitutional class. The question arises upon a settlement, but I do not know that for the purposes of construction in the events which have arisen, and having regard to the class to take, that there is any difference between a settlement and a will. I have been referred to a good many cases on wills, bearing more or less upon the subject I have to consider; and after referring to those and to other cases, I think that Mr. Theobald has accurately summed up the result of them in the

5th edition of his work, at page 592. He there says: "When the gift is to a class or their issue, the further question arises whether the original and substituted legatees form two mutually exclusive classes, so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class. It is clear that if all the original class survive the time of distribution, they alone take": for that he cites *Sparks* v. *Restal* (1) and *Margitson* v. *Hall.* (2) "So if none of the original class survive the time of distribution, the substituted legatees alone take. But if some of the original class die leaving children and others survive the time of distribution:—If the gift is to several persons nominatim as tenants in common or their children, those who survive the time of distribution take, together with the children of those who die before it" (*Price* v. *Lockley* (3)). "In the same way, in the case of a simple substitutional gift to children or their issue to be divided amongst them in equal shares, the issue of a child dying after the testator and before the time of distribution take with the other children."

It is to be observed first of all, had there been no children at the period named, grandchildren and grandchildren only would have taken; so, on the other hand, had all the children been living at the period of distribution, they would have taken to the exclusion of grandchildren. There are two things to be observed in this clause which differentiate it from any case to which my attention has been called. In the first place, this is not a gift to "child or children or their issue," but it is a gift to "child and children or grandchildren." That, of course, has occurred in certain cases; but there are no words in this settlement denoting division, equality, or the creation of a tenancy in common: nor have I even the word "respectively" to assist me to a construction which would give to grandchildren, the children of a deceased parent, that share which the parent would have taken had he or she survived the

(1) (1857) 24 Beav. 218. (2) 12 W. R. 334.
(3) (1843) 6 Beav. 180.

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period named. Of course, the tendency of the decisions has been, wherever the context allows it, to substitute for a parent a child or children, and that becomes a comparatively easy matter when there are words denoting an intention to divide the property into shares; but I have no such words here. I have simply a gift in words which create a joint tenancy amongst those who do take. I cannot predicate of any child that that child takes a share. Each child with the other members of the class of children, or each grandchild with the other members of the class of grandchildren taking under either of these gifts, would take the whole of the property in joint tenancy.

Under these circumstances it appears to me that I have no words at all in this settlement which will enable me to say that there is anything equivalent to a substitution of grandchildren being children of members of the first class for the parent dying before the period at which the first class was to be ascertained.

Had I come to any other conclusion I should have felt extreme difficulty in avoiding the argument of Mr. James, who said that in this deed there are no words importing that the grandchildren forming the alternative or substitutional class ought to be confined to the children of the parent dying. That has had some weight with me in bringing me to the conclusion which I have arrived at, as I could only yield to the result of such an argument with the utmost reluctance.

I do not think that the children of parents dying before the period of distribution can take.

Solicitors: *W. M. Tayler & Son; Druces & Attlee; C. G. Algar.*

G. M.

HUNT *v.* LUCK.

[1899 H. 110.]

FARWELL J.

1900

Oct. 25, 26, 30.

Vendor and Purchaser—Title—Adverse Rights—Notice by Tenancy.

A tenant's occupation of land affects a purchaser with notice of all that tenant's rights, but not of his lessor's title or rights.

Actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights; but the mere fact that the rents are known to be paid to an estate agent, according to the usual practice, affects the purchaser with no notice at all.

Barnhart v. *Greenshields*, (1853) 9 Moo. P. C. 18, and *Knight* v. *Bowyer*, (1857) 23 Beav. 609; (1858) 2 De G. & J. 421, followed.

Mumford v. *Stohwasser*, (1874) L. R. 18 Eq. 556, not followed.

WITNESS ACTION.

In this action the plaintiff, the real representative and tenant for life under the will of her late husband, Dr. Hunt of Hastings, sought to impeach certain conveyances of twenty-seven freehold houses and land at Wimbledon purporting to have been executed by her husband in favour of Gilbert, an estate agent at Hastings.

The defendant Luck was the real representative and residuary legatee and devisee of Gilbert, and the other defendants were his mortgagees. It appeared that the rents of the houses, twenty-five of which were let on weekly tenancies and the other two on tenancies from year to year, had been collected by Woodrow, an estate agent at Wimbledon, and remitted direct to Dr. Hunt until July 10, 1897, after which date they were, by arrangement, remitted by Woodrow to Gilbert as agent for Dr. Hunt.

The rents were paid by Gilbert to Dr. Hunt till his death on June 10, 1898, and were afterwards paid to the plaintiff till the death of Gilbert on September 6, 1898.

After the death of Gilbert, the plaintiff discovered that by a voluntary conveyance of March 31, 1896, part of the property, and by a conveyance of October 10, 1896, expressed to be in consideration of 12,000*l.*, the receipt of which sum was thereby

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acknowledged, the whole of the property, purported to be conveyed by Dr. Hunt to Gilbert absolutely, and that in August, 1897, Gilbert had conveyed the same by way of mortgage to the defendant mortgagees. The title-deeds, which had been deposited by Gilbert with his bankers to secure an overdraft, were by Gilbert's directions handed over to the mortgagees on completion.

The plaintiff alleged that the apparent signature of Dr. Hunt on the conveyances was a forgery, alternatively that Dr. Hunt was at the date thereof totally incapable of transacting business, and alternatively that Gilbert concealed the actual contents of the conveyances from Dr. Hunt, and represented them as being merely documents arranging the terms on which Gilbert was to collect the rents as agent, and that Gilbert fraudulently obtained possession of the title-deeds by representing that they were required for the purpose of the agency.

The plaintiff also alleged that the pretended purchase-money of 12,000*l.*, had never been paid, that neither Gilbert nor the defendants ever took possession of the property, and that the mortgagees were guilty of negligence in omitting to make proper inquiries of the tenants, which inquiries would have elicited the fact that Dr. Hunt was the true owner and in possession and receipt of the rents. Evidence was given that in May, 1897, during the negotiations for the mortgages, the mortgagees employed an agent named Woodhams to value the property on their behalf, and that Woodhams, on inquiry of the tenants, was informed that the rents were paid to Woodrow. Woodhams did not pursue the inquiry further, or ascertain on whose behalf Woodrow was collecting the rents, nor did the mortgagees make any other inquiries on the point, the paper title being satisfactory.

The defendant Luck put in no defence, and did not appear at the trial. The defendant mortgagees denied the plaintiff's allegations, and pleaded that they were purchasers for valuable consideration without notice of any of Gilbert's alleged frauds or of Dr. Hunt's alleged incapacity. At the close of the evidence the judge held that the plaintiff had failed to establish forgery

or the incapacity of Dr. Hunt, but desired to hear argument on the point whether, assuming Gilbert's alleged frauds were proved, the mortgagees were affected with notice thereof.

Upjohn, Q.C., and *W. F. Webster*, for the plaintiff. There is no authority directly in point, but it is submitted that the mortgagees were guilty of negligence in not making proper inquiries. They had constructive notice through their agent Woodhams that the tenants in possession were paying their rents to Woodrow, a stranger to the paper title. This gave them constructive notice of the capacity in which Woodrow received them, namely, as agent for Dr. Hunt. It was their duty to inquire on whose behalf Woodrow was acting.

[FARWELL J. referred to *White* v. *Wakefield*. (1)]

Although it is often said that notice of a tenancy is not notice of the lessor's title—*Barnhart* v. *Greenshields* (2)—there is no decision to that effect, or to the contrary. On the other hand, it is clear that a purchaser has constructive notice of the rights of the tenant: *Holmes* v. *Powell* (3); and this rule is not limited to the terre-tenant, who is in the actual occupation, but it extends also to the person who is known to receive the rents from the occupier of the land: *Knight* v. *Bowyer* (4); Sugden on Vendors and Purchasers, 14th ed. p. 774. Inquiry of the person in possession is the only way of assuring that the purchaser will get more than a paper title.

Hughes, Q.C., *Rufus Isaacs*, Q.C., and *Church*, for the mortgagees, were not called on.

FARWELL J., after holding that the signatures of Dr. Hunt to the two deeds were genuine, and that Dr. Hunt was sane and competent to transact business of this nature, i.e., the selling of real estate, at the time he executed the deeds, continued:—Then comes the question on which I have heard an ingenious argument this morning. It is said, "True it is that Dr. Hunt executed the conveyance of October 10, 1896, which contains in the body of it an acknowledgment of the

(1) (1835) 7 Sim. 401, 417; 40 R. R. 163.
(2) 9 Moo. P. C. 18, 32.
(3) (1856) 8 D. M. & G. 572.
(4) 23 Beav. 609, 640, 641; 2 De G. & J. 421, 449, 450.

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receipt of the purchase-money, but the mortgagees are affected with notice of the fact that Dr. Hunt was the true owner at the time the mortgages were negotiated, and that Gilbert, the mortgagor, was not interested beneficially at all."

This doctrine of constructive notice, imputing as it does knowledge which the person affected does not actually possess, is one which the Courts of late years have been unwilling to extend. I am not referring to cases where a man wilfully shuts his eyes so as to avoid notice, but to cases like the present, where honest men are to be affected by knowledge which every one admits they did not in fact possess. So far as regards the merits of the case, even assuming both parties to the action to be equally innocent, the man who has been swindled by too great confidence in his own agent has surely less claim to the assistance of a court of equity than a purchaser for value who gets the legal estate, and pays his money without notice. Granted that the vendor has every reason to believe his agent an honest man, still, if he is mistaken and trusts a rogue, he, rather than the purchaser for value without notice who is misled by his having so trusted, ought to bear the burden. In the present case it is attempted to fix the mortgagees with notice in this way. The property consisted of twenty-seven houses, twenty-five occupied by weekly tenants, and two by tenants from year to year. The mortgagees employed Woodhams, a valuer, to value the property for the purposes of their advance. The rents were then collected by Woodrow, an estate agent. Woodhams did not see Woodrow at all, but the mortgagees' solicitor's clerk stated that he believed that Woodhams inquired of the tenants to whom they paid their rents. From this it is argued that the mortgagees had constructive notice of Dr. Hunt's title. It is not suggested, and certainly is not proved, that the tenants knew anything of Dr. Hunt; if they were asked, they would say that they paid to Woodrow, who was a well-known house agent and rent collector at Wimbledon.

The plaintiff's contention, therefore, is that it was the duty of the mortgagees to direct their agent (1.) to inquire of the tenants, not merely whether they claimed any and what interest

in their holdings, but also who was the person to whom their rents were paid; and (2.) having ascertained to whom the rents were paid, to inquire of the recipient on whose behalf those rents were received.

Now, in my opinion on the authorities as they stand, it is not the duty of a purchaser to ask the tenants to whom they pay their rents. The fact that a tenant is in occupation is notice of his own rights, but is not notice of the rights of the persons through whom he claims. I take the law as stated in 1853 by Lord Kingsdown (then Mr. Pemberton Leigh), in *Barnhart* v. *Greenshields* (1): "With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (2), but also to interests under collateral agreements, as in *Daniels* v. *Davison* (3), *Allen* v. *Anthony* (4), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be. . . . The last case on the subject, *Bailey* v. *Richardson* (5), rests on precisely the same principles; and although in the argument at the bar it was suggested that the language of the learned judge in that case goes further, and lays down that it is the duty of a purchaser to make inquiries of a tenant in possession, not only for the purpose of protecting himself against any interest of the tenant, but for the purpose of guarding against interests of other persons; it is clear from the context, that such is not the meaning of the words used, and we know from the learned judge himself, that he had no intention of laying down any such doctrine. In all the cases to which we have referred, it

(1) 9 Moo. P. C. 18, 32.
(2) (1794) 2 Ves. Jr. 437; 2 R. R. 278.
(3) (1809–11) 16 Ves. 249; 17 Ves. 433; 10 R. R. 171.
(4) (1816) 1 Mer. 282; 15 R. R. 113.
(5) (1852) 9 Hare, 734.

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will be observed, that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced, was on behalf of the party so in possession. There is no authority in these cases for the proposition, that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject, is the other way." That is an authoritative and correct statement of the law as it was then, and as I understand it is still.

The plaintiff's counsel did not contest the correctness of the propositions which I have just read, but they relied on *Knight* v. *Bowyer* (1) as extending that doctrine. The case is very lengthy and somewhat involved; but so far as is necessary for the present purpose it is sufficient to state that Henrietta, Lady Bowyer, who purchased the reversionary interest in a mortgage from the tenant for life in possession of settled estates in whom that interest was previously vested, had actual knowledge of the fact that a receiver appointed under a deed was in receipt of the rents for certain annuitants. The whole gist of the case, in my view, rests on the proposition that the receiver was to the knowledge of the purchaser receiving for annuitants. I take the proposition from Turner L.J. He says (2): "Now, that Lady Bowyer knew that Bridger was in the receipt of the rents of the estate, and in receipt of them on behalf of annuitants, seems to be clear upon the evidence." That seems to me to be the point on which it turns. Reading for "annuitants" in the present case "Dr. Hunt," the case would be on all fours with *Knight* v. *Bowyer*. (1) If here the mortgagees had known that Woodrow was in receipt of the rents, and in receipt of them on behalf of Dr. Hunt, there would have been then a different case to consider altogether. The meaning of Turner L.J. is rendered even plainer by a passage a few lines lower on the same page: "The cases fully establish that purchasers are bound to make inquiries of occupying tenants as to their rights, and are affected by notice of those rights if they

(1) 23 Beav. 609, 640, 641; 2 De G. & J. 421, 449, 450.
(2) 2 De G. & J. 449.

fail to make such inquiries; and I do not see upon what principle it can be held that inquiry must be made of an occupying tenant, but that if a stranger be found in the enjoyment of the estate no inquiry need be made of him. To hold that such inquiry must be made is not, as I think, any extension of the doctrine of constructive notice, which certainly I am by no means inclined to extend." It is clear, therefore, that Turner L.J. did not himself intend in any way to make any addition to the doctrine as already laid down in *Barnhart* v. *Greenshields* (1), and by himself in *Bailey* v. *Richardson* (2), therein referred to, but was expressly pointing out that it was no extension of that doctrine to apply it to the annuitants who were known by the purchasers to be in enjoyment of the rents. The rule established by these two cases may be stated thus: (1.) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; (2.) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights. In the present case I am by no means satisfied that Woodhams ever inquired at all of the tenants to whom they paid their rents; but assuming that he did, and that he was informed that the rents were paid to Woodrow, a well-known local estate agent, that, in my opinion, affects him with no notice at all. Many landlords have agents, and there is nothing inconsistent with the title shewn to the mortgagees by the abstract in the fact that the rents of the property were collected by a house agent. If it could have been proved that the mortgagees were told that Woodrow collected the rents as Hunt's agent, the case would have been within *Knight* v. *Bowyer* (3); but the mere fact that rents are known to be paid to a house or estate agent puts the purchaser on no inquiry and fixes him with no notice.

Even if any such extension of the doctrine could ever be applied, it certainly could not apply to a case like the present, where the mortgagees rely on Dr. Hunt's signature and receipt, and the plaintiff is attempting to fix them with constructive

(1) 9 Moo. P. C. 18, 32.
(2) 9 Hare, 734.
(3) 23 Beav. 609, 640, 641; 2 De G. & J. 421, 449, 450.

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notice of facts which would make it their duty to distrust and disbelieve that signature. If authority be necessary to shew that the doctrine of constructive notice is not carried to that length, I think it is to be found in *White* v. *Wakefield* (1), to which I referred during the argument. The second proposition in the head-note is: "Where a vendor signs a receipt for the whole purchase-money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser; his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained." Suppose in the present case I found that the deed was the deed of Dr. Hunt and was binding on him, but that the purchase-money had not been in fact paid, the plaintiff's right would be that of the plaintiff in *White* v. *Wakefield* (1), namely, the right of an unpaid vendor to a lien for his purchase-money. Shadwell V.-C. disposed of that claim in this case by words which appear to me to be applicable to the present: "Suppose however that it were otherwise, and that there had been a lien; then the question would be whether, if there were no actual notice to the annuitants, they would be bound by the lien, because their attorney had notice that the plaintiff was in possession of the estate. The only fact of which they could have had notice, was that the money was not paid. But as White had declared by the conveyance, in the most solemn manner, that he had received all the money, no man could be expected to inquire whether the purchase-money had been paid: and therefore, if there had been any lien, the case must have totally failed as against the annuitants." Constructive notice is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him to further inquiry or from his wilfully abstaining from inquiry, to avoid notice. How can I hold that the mortgagees here wilfully neglected to make some inquiry which is usual in cases of mortgages or sales of real estate in order to avoid acquiring some knowledge which they would thereby have obtained? See *Bailey* v.

(1) 7 Sim. 401, 417; 40 R. R. 163.

Barnes. (1) The plaintiff's counsel admitted that, so far as they knew, there was no authority covering the present case. How can I hold that the mortgagees had actual knowledge of some defect, inquiry into which would disclose others?

The action, therefore, fails as against the mortgagees, and as against them I dismiss it with costs.

Since delivering judgment, my attention has been called by the reporter to Sir George Jessel's statement of the law in *Mumford* v. *Stohwasser*. (2) He says: "At that time the house was undoubtedly in the possession of the tenant of the plaintiffs, and therefore he"—sc., the defendant—"had constructive notice of this tenancy, *and consequently notice of the plaintiffs' title*." The last sentence is directly contrary to the statement of the law by the Privy Council above set out. It does not purport to be a decision of a new point, but is the recollection of Jessel M.R. of the law as it had always stood. Neither the case in the Privy Council nor any other authority on the point appears to have been cited, and it is clear that the law was not as stated by Jessel M.R. unless he intended to alter it by his decision. With all respect for that great judge, I am driven to the conclusion that his memory had failed him for the moment in this respect: the Privy Council had stated the law in 1853, and no case had occurred to alter it in the meantime, and I cannot accept the words italicized above as a correct statement. Further, the proposition appears to me unreasonable: the purchaser is fixed with notice of the tenant's rights because he can inquire of the tenant and can practically compel an answer; for a tenant who was told that the purchaser proposed to buy on the footing that the tenant's interest was to the effect appearing in his lease, and who refused to answer, would find it difficult to establish any greater right against that purchaser. But the tenant runs no risk by refusing to answer the inquiry to whom he pays his rent; and it is surely unreasonable to apply the doctrine that a man has constructive notice of a fact which he could have discovered by inquiry to a fact which he could not so discover. If a vendor or mortgagor offers property stated to be subject to tenancies, there is nothing in the fact

(1) [1894] 1 Ch. 25, 35. (2) L. R. 18 Eq. 556, 562.

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that tenants are in possession to give rise to any suspicion: it might well be otherwise, if the mortgagor or vendor stated that there was no tenant, and a tenant was in fact found in possession; but this would depend on the circumstances of the case, and on the suspicion that might or might not be fairly deemed to be aroused thereby.

Solicitors: *Henry H. Fanshawe; Leslie & Hardy, for Sayer & Colt, Hastings.*

G. R. A.

FARWELL J. 1900 Nov. 2, 6.

MULLER *v.* TRAFFORD.

[1900 M. 1788.]

Landlord and Tenant—Lease—Underlease—Covenant for Renewal—Personal Covenant — Covenant Running with Land—Perpetuity — Assignee of Reversion—32 Hen. 8, c. 34, s. 2.

D. A., who was sub-lessee of certain premises, demised the same to F. for the residue of the term then vested in him less the last days thereof, and covenanted for himself, his executors, administrators and assigns, that in case he should obtain from the freeholder, his heirs or assigns, any extension of the term for which he then held the premises, then he, his executors, administrators or assigns, would grant to F. a new lease for such extended term as would include the unexpired residue of the original term granted to F., and the further term, less the last days thereof, which might be granted to D. A. by the freeholder, his heirs or assigns. D. A. died, and his reversion became vested in the defendant, who surrendered his term to the freeholder and obtained from him a new lease for an extended term, subject to existing underleases. F. having died, the plaintiff acquired from his executors his interest in the premises, and then claimed specific performance of D. A.'s covenant with F.:—

Held, (1.) on the construction of the covenant, that it was personal to D. A. alone, and did not bind his representatives; (2.) that the covenant was not strictly a covenant for renewal, and did not on that account run with the land; but, assuming that it did run with the land, the doctrine of perpetuity had no application; and (3.), following *Brereton* v. *Tuohey*, (1858) 8 Ir. C. L. Rep. 190, *Kent* v. *Stoney*, (1859) 9 Ir. Ch. Rep. 249, and *Coey* v. *Pascoe*, [1899] 1 I. R. 125, that the covenant ran with the reversion which was vested in the covenantor at the time when he entered into the covenant; and, consequently, that the statute 32 Hen. 8, c. 34, s. 2, did not apply. On these grounds the action was dismissed.

TRIAL OF ACTION.

By an indenture of lease dated June 26, 1833, Sir Charles Morgan demised to Andrew Reid a piece of ground, whereon

(inter alia) the houses and premises forming the subject of this action were erected, for a term of eighty years from September 29, 1822.

By an underlease dated December 29, 1840, Reid demised the said premises to Daniel Austin for sixty-two years from September 29, 1840, less ten days.

By a further underlease dated June 25, 1851, Daniel Austin demised the same premises to Eden Fisher for the term of fifty-two years less twenty days from September 29, 1850, at the yearly rent of 7*l.* 10*s.* By this deed Daniel Austin, for himself, his executors, administrators and assigns, covenanted with Eden Fisher, his executors, administrators and assigns, that "in case the said Daniel Austin shall obtain from the said Sir Charles Morgan, his heirs or assigns, any extension of the term for which the said D. Austin now holds the ground and premises hereby demised with other hereditaments and premises from the said Andrew Reid under a certain indenture of lease bearing date the 29th day of December, 1840, then and in that case the said D. Austin, his executors, administrators or assigns, shall and will within three calendar months next after such extension being obtained at the cost in all things of the said Eden Fisher, his executors, administrators and assigns, grant unto him, the said Eden Fisher, his executors, administrators and assigns, a new lease of the said ground and premises hereby demised for such extended term as will include the term then unexpired of the term hereby granted, and the further term less ten days which may be granted to the said D. Austin by the said Sir Charles Morgan, his heirs or assigns." And the said Eden Fisher, for himself, his executors, administrators and assigns, covenanted with D. Austin, his executors, administrators and assigns, that he would accept such new lease and execute a counterpart thereof, and that such new lease and counterpart should contain the same covenants as were contained in the lease of June 25, 1851, save only that the rent should be 9*l.* a year instead of 7*l.* 10*s.*

Daniel Austin died on May 31, 1854, having by his will, dated December 1, 1853, bequeathed all his leaseholds to certain persons therein mentioned.

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By an indenture dated November 1, 1897, the persons entitled to the premises in question under the will of Daniel Austin assigned the same to the defendant Trafford, subject to the underlease of June 25, 1851, for all the residue then to come of the term of sixty-two years minus ten days from September 29, 1840, created by the lease of December 29, 1840, subject to the covenants and provisions therein contained and on the part of the lessee to be performed and observed.

The defendant thus became entitled to the premises for the residue of the term granted by the lease of December 29, 1840, which was the whole term granted by the head lease of June 26, 1833, less ten days.

At this time the reversion under the last-mentioned deed had become vested in Lord Tredegar, and upon a surrender being made by the defendant Trafford to Lord Tredegar of his interest under the lease of December 29, 1840, accompanied by a covenant to indemnify Lord Tredegar against any claim which might arise in respect of the outstanding days of the term granted by the original lease of 1833, Lord Tredegar agreed to grant to the defendant Trafford a new lease of the premises subject to the existing underleases. Accordingly, by three separate indentures dated February 27, 1899, Lord Tredegar demised the premises in question to the defendant Trafford, subject as aforesaid, for the term of fifty years from September 29, 1896, at a yearly rent of 10*l.* 10*s.* in each case. Eden Fisher died on April 27, 1892, having by his will appointed certain persons to be his executors. By an indenture dated October 25, 1892, those executors assigned to the plaintiff the residue of the term created by the underlease of June 25, 1851, and all the interest of the underlessee thereunder, including the right to a renewal under the above-mentioned covenant.

The defendant having refused to grant the plaintiff any renewal, this action was brought by the plaintiff for specific performance of the covenant, or, in the alternative, damages for the breach thereof.

C. E. Jenkins, Q.C., and *D. M. Kerly*, for the plaintiff. This is a covenant which runs with the land, and the plaintiff is

entitled to the benefit of it: *Simpson* v. *Clayton* (1); *Roe* v. *Hayley*. (2) It is not obnoxious to the rule against perpetuities: *London and South Western Ry. Co.* v. *Gomm* (3); *Friary Holroyd & Healey's Breweries, Limited* v. *Singleton* (4); *White* v. *Southend Hotel Co.* (5); *Birmingham Breweries, Limited* v. *Jameson*. (6)

A covenant for renewal runs with the land. Assuming that, it will be said that in this case the particular event has not happened to bring it into effect, namely, the obtaining of an extension by Daniel Austin. Upon that point we rely upon *White* v. *Southend Hotel Co.* (5) as shewing that the assigns of Daniel Austin are bound by the covenant.

[FARWELL J. referred to *Hyde* v. *Skinner*. (7)]

The question is whether the covenant runs with the land so as to bind the assignees of Austin's reversion. In a case of landlord and tenant, that depends upon the statute 32 Hen. 8, c. 34, under which, by s. 2, lessees and their assigns have the like remedies against the assignees of the reversion as the lessees had against their lessors. See *Spencer's Case*. (8)

As between landlord and tenant the only thing you have to consider is whether the covenant affects the land demised: *Isteed* v. *Stoneley*. (9)

[FARWELL J. So far as the nature of the covenant goes it runs with the land. It is so laid down by Lord Ellenborough in 1810. (2)

Upjohn, Q.C. I do not dispute it.]

There is no authority that the covenant must be limited to the particular reversion which the covenantor has in him at the time: 1 Platt on Leases, p. 732. No covenant for renewal which touches the thing demised is bad for perpetuity. Jessel M.R. treated it as an exception, and no reason has ever been given for it. The reason may be that the renewal is generally obtained by the tenant by virtue of his position. In

(1) (1838) 4 Bing. N. C. 758; 44 R. R. 841.
(2) (1810) 12 East, 464; 11 R. R. 455.
(3) (1882) 20 Ch. D. 562.
(4) [1899] 1 Ch. 86; 2 Ch. 261.
(5) [1897] 1 Ch. 767.
(6) (1898) 67 L. J. (Ch.) 403.
(7) (1723) 2 P. Wms. 196.
(8) (1583) 5 Rep. 16; 1 Sm. L. C. 10th ed. p. 52.
(9) (1664) 1 And. 82.

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substance the tenant, if he sub-lets, merely transfers all that he has. It is treated as part of the original grant. Whatever the reason may be for the anomaly, the objection of perpetuity has never been taken to these cases of covenants for renewal. There are many Irish cases in which the objection, if sound, might have been taken, but was not: *Evans* v. *Walshe* (1); *Revell* v. *Hussey* (2); *Hackett* v. *M'Namara* (3); *Lawder* v. *Blachford.* (4) The objection was taken unsuccessfully in *Pollock* v. *Booth* (5); but there the covenant was in a peculiar form.

In all the text-books this is treated as a bare exception to the rule: Challis on the Law of Real Property, 2nd ed. p. 173; Marsden on Perpetuities, p. 15.

It may also be said that the defendant is not the assign of the reversion; but the Court will look at the substance of the transaction and say that Trafford, as the assign of Austin, obtained the extension, and that he is bound by the covenant: *Lumley* v. *Timms.* (6)

Upjohn, Q.C., and *P. Wheeler*, for the defendant. The defendant himself has not entered into the covenant upon which he is sued. The covenant was personal to Daniel Austin.

The plaintiff can only make the defendant liable either on the doctrine of *Tulk* v. *Moxhay* (7); or on the ground that the covenant operated as a conveyance in equity, and that the defendant purchased with notice of the plaintiff's interest; or on the ground that the covenant runs with the reversion of which the defendant is the assign.

As to that we submit—

(1.) That the covenant does not run with the reversion: it is collateral to it;

(2.) The defendant never was the assign of Austin; and

(3.) If he was, he parted with the reversion by surrendering it to Lord Tredegar, and there was no breach of the covenant by the defendant while the reversion was in him.

(1) (1805) 2 Sch. & Lef. 519; 12 R. R. 88, n.

(2) (1813) 2 Ball & B. 280; 12 R. R. 87, Pref. VI.

(3) (1836) L. & G. temp. Plunket, 283.

(4) (1815) Beat. 522.

(5) (1875) Ir. R. 9 Eq. 229, 607.

(6) (1873) 28 L. T. 608.

(7) (1848) 2 Ph. 774.

Moreover, the lessor had a term only, whereas the lease the plaintiff now demands outruns the reversion.

A covenant for renewal by a person holding a limited interest in lands does not bind the estate beyond that interest: *Brereton* v. *Tuohey* (1); *Kent* v. *Stoney* (2); *Coey* v. *Pascoe*. (3)

This is not strictly a covenant to renew, and the rule against perpetuity consequently applies: *Swinburne* v. *Milburn*. (4)

Jenkins, Q.C., in reply.

FARWELL J. In this action the plaintiff seeks in effect for specific performance of a covenant contained in an underlease dated June 25, 1851, and made between Daniel Austin of the first part, Thomas Golding of the second part, and Eden Fisher of the third part. Daniel Austin held the property demised from a man called Andrew Reid under an indenture of lease dated December 29, 1840. Andrew Reid held under a lease from Sir Charles Morgan, who was the freeholder. This lease contained a covenant in these terms. [His Lordship read the covenant, and continued:—]

The first question is one of construction. It will be observed that the whole covenant depends on the condition precedent that "in case the said Daniel Austin shall obtain," and so on. He was an underlessee so far as Sir Charles Morgan was concerned, and had no privity of estate with him, and the proviso in terms is confined to Daniel Austin. It has been pointed out to me, no doubt with considerable force, that the term "Daniel Austin" may have been intended to include his executors, administrators, or assigns. On construction, if it depended on that alone, I should be of opinion that it meant Daniel Austin alone. It is a matter upon which I quite feel that other people may come to a different conclusion; but when the lessor or his draftsman draws a lease in this form and uses the term Daniel Austin in this way—"in case the said Daniel Austin shall obtain from the said Sir Charles Morgan, his heirs or assigns"—it appears to me that he had in his mind in the very sentence with which he commenced

(1) 8 Ir. C. L. Rep. 190.
(2) 9 Ir. Ch. Rep. 249.
(3) [1899] 1 I. R. 125.
(4) (1884) 9 App. Cas. 844, 855.

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a clear distinction between the person he mentions and the representatives of that person after his death. When he deals with Sir Charles Morgan he uses the words "heirs and assigns"; when he deals with Mr. Daniel Austin he mentions him and him alone, and I do not think I should be justified in adding to the words "Daniel Austin" the words "his executors, administrators, or assigns"—I should have to add the word "assigns," because here "executors and administrators" alone would not suffice. Apart from any question of construction depending merely upon the words, I think the draftsman was well advised, and probably intended to limit this to Daniel Austin himself, because, for the reasons which I shall hereafter give on the other points, I think he could not properly have given this option by way of condition precedent to Daniel Austin, his executors, administrators, and assigns, without limiting it so as to avoid infringing the rule against perpetuity. On construction, therefore, I am in favour of the defendant.

The next point is this. It is said that this is a covenant running with the land. If so, then no question of perpetuity would arise. A covenant to renew has been held for at least two centuries to be a covenant running with the land. I am not prepared to say that this is a covenant to renew. A covenant to renew is a technical term well understood. This is a covenant that in case the underlessee gets from somebody else, not his landlord, and, therefore, not by way of renewal, a further term; it leaves out of consideration altogether the lessor in this particular underlease and the term vested in him, and provides that if the underlessee gets from the freeholder, whose estate extends beyond and has no connection with the estate of the underlessee, a further term, then he will do certain things. Now, if, as has been argued, the rule that covenants for renewal run with the land, and are not, therefore, within the rule of perpetuity, is a mere technical rule, resting on authority and not on any rational principle, then I answer technicality with technicality, and say that this is not a covenant for renewal at all; and I should not be prepared to extend what has been stated in the arguments to be an anomaly,

without any reason underlying it, to a case which is not strictly a covenant for renewal.

But now I will assume that this is a covenant for renewal running with the land: it is then in my opinion free from any taint of perpetuity, because it is annexed to the land. See *Rogers* v. *Hosegood* (1): "The accurate expression appears to me to be that the covenants" (i.e., running with the land) "are annexed to the land and pass with it in much the same way as title deeds." That is adopted by the Court of Appeal as correct, and the same phrase, "annexed to the land," is used by Collins L.J. in delivering the judgment of the Court. He then goes on to say, after referring to the cases: "These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract *in its inception* binds the land." It must bind the land from its inception, because it would otherwise be an executory interest in land arising in futuro, and therefore obnoxious to the rules against perpetuity. Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application.

But then it is argued that as between landlord and tenant it depends upon the construction of the statute, 32 Hen. 8, c. 34; and I agree that it does, because I think it is settled that at common law covenants run with the land, but not with the reversion. So far as the statute is concerned, the question is what is the meaning of the section, which gives the like action and remedy against all persons and bodies politic, their heirs,

(1) [1900] 2 Ch. 388, 394, 405-6.

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successors, and assigns having any gift or grant of the reversion of the land and hereditaments letten for any covenant in the lease as the same lessees might have had against the lessors, their heirs and successors. Now if the doctrine of perpetuity does not apply to covenants running with the land because they are annexed to the land and form part of it ab initio, then "the reversion" in the Act must mean the reversion which the lessor has in him at the date at which he grants the lease, or, to use Collins L.J.'s expression, "in the inception" of the dealing between the parties. If that is so, then all I have to see is whether Daniel Austin had at the time when he entered into this covenant such an interest as could possibly be bound so as to give effect to the covenant which he entered into. In my opinion he clearly had not. The covenant runs: "In case he should obtain" from the freeholder, with whom he had no privity, "any extension of the term which he Daniel Austin then held from Andrew Reid," the intermediate lessee. It is obvious, therefore, that the contract did not contemplate in its terms any dealing with the reversion then vested in Daniel Austin so as to give effect to this particular covenant out of it. Although I have no English authority exactly in point, the Irish cases which have been cited are absolutely on all fours with the present case, and although they are not binding upon me, the Court of Exchequer Chamber which delivered the judgment in the case of *Brereton* v. *Tuohey* (1) was an exceedingly strong Court, and I respectfully express my assent to the reasoning and decision in that case. The head-note is this: "A covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest; and, therefore, if his assignee acquires the inheritance, it is not bound by the covenant." It is pointed out by Lefroy C.J. that, if there was a covenant for perpetual renewal of a lease binding the inheritance for the benefit of the covenantee who was himself the only lessee, such covenant for perpetual renewal would be a covenant running with the land for his benefit, and therefore, on the principle I have suggested, inherent in the land and annexed

(1) 8 Ir. C. L. Rep. 190.

to it, and the lessee would accordingly be entitled to assign the full benefit of the reversion with the annexed covenant for perpetual renewal as part of it. But if the covenant is by a lessee who has no such right, but has merely a reversion of ten days from the freeholder, such covenant cannot affect the whole estate, but only the reversion of ten days. It appears to me, therefore, on the authority of the Irish cases, to which I express my respectful assent, and also on principle, that this is a case to which the statute does not apply, because the covenant runs with the reversion which is vested in the covenantor at the time he enters into the covenant.

This renders it unnecessary for me to consider the other grounds suggested by Mr. Upjohn. The other Irish cases which were referred to by Mr. Kerly were all suits between the original covenantor and covenantee, and they do not appear to me to have any bearing on this point. I cannot find any cases which suggest any doubt as to the correctness of the Irish decisions, with the reasoning in which I have already expressed my assent. The result is that the action fails, and is dismissed with costs.

Solicitors: *Woollacott & Son; Carlisle, Unna, Rider & Heaton.*

G. A. S.

FARWELL J.

1900

Nov. 7, 9.

In re POPE.
SHARP *v.* MARSHALL.

[1900 P. 1521.]

Will—Construction—Direction to accumulate Income beyond Twenty-one Years—Residue—Tenant for Life.

The testator, who died in 1865, by his will gave two freehold houses to trustees, and directed them to apply the income arising therefrom at their discretion for the benefit of his daughter F. for life, and after her death he gave the premises, together with any surplus accumulation of rents that might not be applied for the benefit of F., upon trust for her children who should attain twenty-one, and in default of such children then over. He gave his residue upon trust for certain persons for life with remainders over. F. died in 1900, at which time the trustees had in their hands a considerable sum representing the accumulated surplus rents :—

Held, that the accumulations beyond the period of twenty-one years from the testator's death were bad under the Thellusson Act, and fell into residue; and that the tenant for life of the residue was not entitled to the surplus rents themselves, but only to the income arising from the investment thereof.

Crawley v. *Crawley*, (1835) 7 Sim. 427; 40 R. R. 170, and *O'Neill* v. *Lucas*, (1838) 2 Keen, 313, followed.

In re Phillips, (1880) 49 L. J. (Ch.) 198, disapproved.

Roof Pope, the testator, by his will, dated August 21, 1865, gave two freehold houses to trustees upon trust to receive the rents, issues, and profits thereof, and, after making certain deductions as therein mentioned, to pay and apply the residue, or such part thereof as the trustees should in their absolute discretion think proper, unto and for the benefit of his daughter Frances Pope during her life, and from and after her decease to stand seised of the premises and any surplus or accumulation of rents that might not be paid to or applied for the benefit of his said daughter Frances upon trust for her lawful child or children who should live to attain the age of twenty-one years; and if she should leave no child who should attain that age, then he gave the same two houses to the trustees upon trust for his daughter Florence Pope during her life, and after her decease for her child or children who should

attain twenty-one. The testator gave the residue of his estate to his trustees upon trust as soon as conveniently might be after his death to sell, call in, and convert into money such part thereof as should not consist of houses or lands; and the testator declared and directed that his trustees should stand possessed of such parts of his residuary estate as should consist of money, and of the moneys to arise from such sale and conversion, upon trust to pay thereout his debts, funeral and testamentary expenses, and legacies, and subject thereto upon trust to invest as therein mentioned and pay the rents, profits, interest, dividends, and income thereof unto certain persons for life, with remainders over.

The testator's daughter Frances was of weak intellect, and from the testator's death in 1865 down to her death in 1900 the trustees of the will had made an allowance for her maintenance out of the income arising from the two freehold houses, and had accumulated the surplus income. These accumulations now amounted to a sum of 2700*l.*, and were represented partly by certain investments in railway stocks and partly by a sum of cash.

This was an originating summons taken out by the trustees for the determination of the question who was entitled to the accumulated fund.

By the summons, as originally taken out, the following questions (inter alia) were submitted for the decision of the Court:—

1. Whether or no the sum of 2700*l.* in the hands of the plaintiffs as trustees, being accumulations of rents and profits of premises devised by the testator for the benefit of his daughter Frances Pope (now deceased), which had not been applied for her benefit, devolved in the same way as the said premises were directed by the will to devolve after her death.

2. Whether or no the said sum of 2700*l.* formed part of the testator's residuary estate.

Upon the first hearing of the summons Farwell J. decided that the accumulation of the surplus rents, so far as it extended beyond the period of twenty-one years from the testator's death, was bad by reason of the Thellusson Act; and that from the

FARWELL J. 1900 POPE, *In re.* SHARP *v.* MARSHALL.

end of that period the surplus rents fell into residue. A further question was then suggested, and by the direction of his Lordship was raised by amendment of the summons, namely, whether, in the event of the Court being of opinion that the said sum of 2700*l.* formed part of the testator's residuary estate, the whole or any, and if so what part thereof, ought to be treated as income, and go to the tenant for life of the residuary estate; or whether the whole or any, and if so what part thereof, ought to be treated as forming part of the capital of the residuary estate.

This question was the only one calling for a report.

Hatfield Green, for the trustees.

Butcher, *Q.C.*, and *E. G. Kimber*, for persons entitled to the residue in remainder. The surplus rents since 1886 should have been invested from time to time by the trustees, and the income only of such investments should have been paid to the tenants for life of the testator's residuary estate: *Crawley* v. *Crawley* (1); *O'Neill* v. *Lucas*. (2) Those cases have been referred to with approval in all the text-books, and no doubt as to their correctness could exist were it not for a decision of Malins V.-C. in *In re Phillips*. (3) But that case has practically been disregarded by the profession. It is not referred to in Jarman on Wills nor in Lewin on Trusts. On the contrary, the decision in *Crawley* v. *Crawley* (1) is treated by those learned authors as good law. The same view of the law is taken in Hargrave on the Thellusson Act (1842), pp. 168, 174. Even if the decision in *In re Phillips* (3) was right, the point did not necessarily arise in that case. So that if it is good law it is distinguishable, and if it is wrong the Court will follow the earlier authorities.

If it had been simply an estate pur autre vie, no question could have arisen. The duty of the trustees would have been to sell and convert and invest the proceeds of sale, and stand possessed of the investments in trust to pay the income to the tenants for life, and to hold the capital for the remaindermen.

(1) 7 Sim. 427; 40 R. R. 170. (2) 2 Keen, 313.
(3) 49 L. J. (Ch.) 198.

It cannot make any difference in principle that the surplus rents are a sum of money varying in amount.

Cassel, for the tenants for life of the residue. *In re Phillips* (1) is the latest authority, and is referred to in Theobald on Wills. In the last edition (5th ed.) of that text-book, at p. 539, the statement of the law is modified, having regard to Malins V.-C.'s decision. Under the will lands and houses are excepted from the trust for conversion. These accumulations may fairly be treated as coming within that exception.

This is like the case of a contingent legacy, and comes within the principle of *Allhusen* v. *Whittell*. (2) The testator has expressly excepted lands and houses, and he intended the tenants for life to take the rents of the houses themselves.

In re Earl of Chesterfield's Trusts (3) does not apply.

C. E. Jenkins, Q.C., and *M. Romer;* and *W. E. Capron*, for other parties.

FARWELL J. This summons is to be treated as amended by raising the further question suggested by Mr. Cassel, which, if it had not been for authority, I should have thought was really unarguable. The testator here devised two freehold houses specifically, and he directed the income of these two houses to go to the extent which his trustees thought fit for the maintenance of a daughter of unsound mind, with an accumulation of the residue. I have already held that the accumulation of that residue is bad beyond twenty-one years. From that period the surplus rents fall into residue. The question now raised is whether, inasmuch as the residuary property of the testator is given to trustees upon trust to convert all excepting lands and houses, and to invest and pay the income to the tenant for life with remainders over, the surplus income, which is so let loose and falls into the residue by reason of the Thellusson Act, is to be paid to the tenant for life of the residue, or is to be invested by the trustees, and only the income arising therefrom is to be paid to the tenant for life. In my opinion, it is reasonably clear that the tenant

(1) 49 L. J. (Ch.) 198. (2) (1867) L. R. 4 Eq. 295, 303.
(3) (1883) 24 Ch. D. 643.

FARWELL J. 1900 POPE, *In re.* SHARP *v.* MARSHALL.

for life under this will gets the income only. I cannot adopt the suggestion of Mr. Cassel that lands and houses include these surplus rents. It is very much, as Mr. Butcher has put it, as if it were an estate pur autre vie that is given to the trustees on trust to convert. They have not in fact converted it, but they have received and retained the whole of the rents down to the present time since 1886, when the twenty-one years expired. So far as the authorities go, it has been held by Shadwell V.-C. in *Crawley* v. *Crawley* (1), and by Lord Langdale in *O'Neill* v. *Lucas* (2), that the income so let loose does not, under circumstances such as the present, belong to the tenant for life of the residue, but it is a portion of the corpus of the residue, and is to be treated as such by way of investment. All the text-books, so far as my attention has been called to them, down to the last edition of Theobald on Wills, treat those cases as settling the law; but Mr. Cassel has referred me to a decision of Malins V.-C., which is last in point of date—*In re Phillips* (3)—where he decided exactly the contrary. The head-note of that case is as follows: "Where the income of a particular fund is directed by a testator to be accumulated for more than twenty-one years from his death, and the residue of the personal estate is given to A. for life, with remainder over, the income of the particular fund, and of the accumulations, forms, after the twenty-one years, part of the income of the tenant for life, and does not fall into the capital of the residue." I have, therefore, in that case a clear decision of the Vice-Chancellor on this particular point directly in the teeth of the two earlier authorities; but Mr. Butcher has pointed out, and I think rightly, that there were two questions in that case, and the second question to which the head-note was directed was not really necessary to the decision of the case, because the point never arose. Moreover, I find that the Vice-Chancellor, although overruling in fact *Crawley* v. *Crawley* (1) and the case before Lord Langdale, *O'Neill* v. *Lucas* (2), which was not cited to him, gives as the reason for disregarding it that it does not decide this particular

(1) 7 Sim. 427; 40 R. R. 170. (2) 2 Keen, 313.
(3) 49 L. J. (Ch.) 199.

point. To my mind, with all respect, it seems to be the very point decided in *Crawley* v. *Crawley* (1), and I feel at liberty to consider the judgment, and to see whether the reason given is one which satisfies my mind, because in the state of the authorities I think I am entitled to form my own judgment. Now, the reason given by the Vice-Chancellor is this (2): "To say—as Mr. Wood" (who argued the case) "does—that, although you cannot go on accumulating beyond the twenty-one years, you may, after that period, go on investing; and that the widow is only to have the interest of the investment, is what I cannot agree to. To go on investing the income (after the twenty-one years) is, to all intents and purposes, to go on accumulating; but the Thellusson Act says that the accumulations shall stop at the end of the twenty-one years. To my mind, the accumulations necessarily stop at the end of twenty-one years. They then fall into residue." Apparently, so far as I am able to follow it, that means that you accumulate within the meaning of the Thellusson Act although you do not direct the income as it is received to be invested and accumulated. But if you direct the income to be invested and the income of those investments to be paid to a tenant for life, you do not accumulate. The preamble of the Act is as follows: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained"; then it goes on to enact that "no person shall after the passing of this Act, by any deed or will," (reading it shortly) "settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term," and so on. Now I have referred to Dr. Murray's great dictionary under the head "Accumulate," and I think that his definition of that word accords with my own view of its meaning. Under "Accumulation" the second definition is: "The action or process of growing into a heap, or large amount. The growth of a sum of money by the continuous addition

(1) 7 Sim. 427; 40 R. R. 170. (2) 49 L. J. (Ch.) 200.

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of the interest to the principal." If that is the true definition, and it appears to me to be so, I really do not understand what the Vice-Chancellor meant by saying that investing and paying the income to a tenant for life and not accumulating it, is accumulating within the meaning of the Thellusson Act. With every respect to the memory of the late Vice-Chancellor, I am wholly unable to follow that case; but I shall follow the two earlier authorities, which I think are sound. I think the better plan will be to ascertain the sums that from year to year were actually retained by the trustees as not required for the daughter of unsound mind, and the investments in which they were put, so as to get the actual income which the tenant for life would have been entitled to receive if this decision had been given in 1886, and then the net result will be that she will get that sum.

Solicitors: *Trinder, Capron & Co.*

G. A. S.

FARWELL J. 1900 *Nov.* 14, 15.

DEVERGES *v.* SANDEMAN, CLARK & CO.

[1899 D. 1935.]

Mortgage—Chose in Action—Shares in Company—Power of Sale.

Where shares in a commercial company are mortgaged and no time is fixed for payment of the mortgage debt, a mortgagee who has acquired the legal title to the shares has an implied power of sale on the failure of the mortgagor to pay after the lapse of a reasonable time.

THIS was an action for the redemption of 1050 shares in the Central and West Boulder Gold Mines, Limited, and in the alternative for damages for the alleged wrongful sale of those shares. In July, 1897, the plaintiff, who was a Spaniard, was minded to buy certain shares in the Central Boulder Gold Mines, Limited, through the defendants, who were a firm of stockbrokers, and accordingly, between July, 1897, and October, 1897, they bought shares in this company for the plaintiff amounting altogether to 700. A portion of the purchase-money was paid by the plaintiff, the balance being found for

him by the defendants upon an agreement that they should have a charge upon the shares for the unpaid balance with interest at 6 per cent., and by the desire of the plaintiff the shares were registered in the names of the defendants.

On August 31, 1897, the defendants wrote to the plaintiff asking for a remittance on the shares which had then been purchased on his behalf, and informing him that, unless he placed them in funds by September 15, the next account day, they should deem themselves at liberty to sell the shares at their discretion as to date and at the then market price.

The plaintiff did not remit the money, and, notwithstanding repeated applications by the defendants for payment, with the exception of 12*l.* 3*s.* 10*d.* remitted by the plaintiff in November, 1897, no further payment was ever made by him. After placing that amount to his credit, the amount remaining due from him to the defendants was 558*l.* 19*s.* 2*d.* plus interest.

In June, 1898, the defendants received from the Central Boulder Gold Mines, Limited, a circular, which they sent on to the plaintiff, with reference to the reconstruction of the company. Under the scheme of reconstruction a new company was to be formed, and the shareholders of the old company were to be entitled, in exchange for every two fully paid 1*l.* shares standing in their names, to apply for three 1*l.* shares in the new company having 17*s.* per share paid up. In pursuance of this scheme, the Central Boulder Gold Mines, Limited, went into liquidation, and its assets and undertaking were taken over by a new company called the Central and West Boulder Gold Mines, Limited.

On August 22, 1898, the defendants wrote to the plaintiff: "We have twice written you on the subject of your holding of the Central Boulder Company shares (which are in our names), and have asked you . . . . to give us your decision whether you intend participating in the reconstruction of the company, thereby incurring a liability of 3*s.* on 1050 shares, or whether you will adopt the only other alternative of allowing your shares to be forfeited, and thereby accept the entire loss and sacrifice of the shares you have purchased (but which you have not yet entirely paid us for)." The letter then proceeded to

FARWELL J. 1900 DEVERGES v. SANDEMAN, CLARK & CO.

give notice to the plaintiff that the defendants did not intend to find the money necessary to take up the 1050 shares unless they first received from him a remittance for that amount. On September 9, 1898, the defendants telegraphed to the plaintiff, who was then in Spain, "Must have cash remittance"; and they also wrote a letter to the plaintiff confirming the telegram.

On September 15, 1898, they wrote a further letter which, after again requesting a remittance, concluded as follows: "We would impress on you that if you fail to remit you will lose all interest in the shares, and we must proceed against you to recover the sums we have paid on your account." The plaintiff having replied that it was impossible for him to remit cash, the defendants shortly afterwards applied for the shares and obtained an allotment to themselves, after paying the 3*s*. per share. In February and March, 1899, they sold the shares without further notice to the plaintiff, believing that they were entitled to them as absolute owners. However, after the commencement of the action, they abandoned their claim to the absolute ownership of the shares, and submitted by their defence to account for the proceeds as mortgagees. The plaintiff complained that the sale of the shares was improper, and that he had suffered loss thereby by reason of their having subsequently risen in price.

Robert Wallace, *Q.C.*, and *G. H. Stutfield*, for the plaintiff.

Upjohn, *Q.C.*, and *Stewart-Smith*, for the defendants. A mortgagee of stock or shares has by law a power of sale after the time fixed for payment of the mortgage debt, or, where no time is fixed for payment, after the lapse of a reasonable time: *In re Morritt* (1): *Tucker* v. *Wilson* (2); *Lockwood* v. *Ewer* (3); *France* v. *Clark* (4); *Kemp* v. *Westbrook* (5); *Langton* v. *Waite* (6); Robbins on Mortgages, p. 275; Fisher on Mortgages, 5th ed. p. 446.

That a reasonable time has elapsed here is plain from the

(1) (1886) 18 Q. B. D. 222.
(2) (1714) 1 P. Wms. 261; also reported sub nom. *Wilson* v. *Tooker*, 5 Bro. P. C. 193.
(3) (1742) 2 Atk. 303.
(4) (1883) 22 Ch. D. 830.
(5) (1749) 1 Ves. Sen. 278.
(6) (1868) L. R. 6 Eq. 165.

fact that the debt accrued due in November, 1897, and the first sale was in February, 1899. Notwithstanding repeated applications for payment, no payment or any genuine offer was ever made after November, 1897. The plaintiff had notice that the defendants intended to sell if they could not get payment, and he had ample opportunity of taking up the new shares. He cannot at once approbate and repudiate the defendants' acts.

Wallace, Q.C., in reply. A mortgagee of stock or shares has no power to sell without pursuing the ordinary remedies of a mortgagee. In *Tucker* v. *Wilson* (1) the decision was based upon the implied consent of the mortgagor. The other cases cited have no application. Here there can be no implied consent, because the plaintiff was misled by being informed that his security was gone; nor was any notice of the sale given to the plaintiff. The sale was therefore improper.

FARWELL J., after stating the facts and observing that the defendants were inaccurate in stating that the security would be forfeited unless the new shares were taken up by the plaintiff, and after holding that in any point of view the defendants as mortgagees were justified in realizing a sufficient number of the new shares to recoup themselves the expense of taking them up, continued as follows:—

Two questions arise in this case: First, has a mortgagee of shares, who has a legal title, by reason of their having been transferred into his name, a right at law or in equity, or both, to sell those shares, if he cannot get paid after a reasonable time has elapsed? Secondly, assuming that the general law is against the defendants, is there in this particular case any implied agreement that they shall have such a power of sale? The general principle is stated, in my opinion, accurately in Robbins on Mortgages, which is founded on Mr. Coote's book, at the bottom of p. 275. He is dealing with mortgages of stock, and in my opinion the shares in this company stand on the same footing: "Express powers were not formerly necessary in mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now

(1) 1 P. Wms. 261.

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rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure." The authority he cites for that is *Tucker* v. *Wilson*. (1) That was a case of Exchequer annuities. Lord Harcourt L.C. took the view that there was no implied power of sale given by law in that case, because he thought the annuities were like rent-charges issuing out of lands, and not like stocks, "which may be thought to be of imaginary value." That was reversed by the House of Lords; but I pause for a moment to see what was the ground of the Lord Chancellor's decision. It is clear to my mind that in likening the Exchequer annuities to rent-charges he meant this: "I regard this security as though it was land, or a rent-charge issuing out of land, to which the ordinary rules apply, and you must find an express power of sale." I do not understand him to contest the general proposition that in the case of stock, which may be taken to be of what the Lord Chancellor calls imaginary value, by which I think he meant fluctuating value, there was a general power of sale at law. That that is the true view, I think, appears from the observations of Fry L.J. in the course of the argument in *In re Morritt*. (2) Referring to *Tucker* v. *Wilson* (1), and some other cases which had just been cited, he says: "Those cases are cases of 'stocks' not of movable chattels," the contrast being drawn, not between stocks and shares, but between choses in action and movable chattels, matters capable of manual delivery, and therefore the proper subject-matter of a pledge, with which the case before the Lord Justice was concerned. Then he continues: "And the ground taken seems to have been that the value of stocks being subject to fluctuations, the necessity for obtaining a decree of foreclosure before selling would as a matter of business destroy the security." That is the view that Sir Edward Fry takes in his judgment of the case of *Tucker* v. *Wilson* (1), and that that is the true view, and the view

(1) 1 P. Wms. 261. (2) 18 Q. B. D. 222, 227.

adopted by the House of Lords as well as, I think, by the Lord Chancellor, appears from the report of that case in the House of Lords, sub nom. *Wilson* v. *Tooker*. (1) The argument for the defendant, which, as I infer from the report, was adopted by the House, was this: "It was argued, that annuities in the Exchequer could not be said to differ materially from other stocks, the Parliament having provided a constant interest for all Government securities, as well as for these annuities; there was indeed some difference between them respecting the principal-money, but this difference was much to the advantage of the stocks; for there, the principal was to be repaid entirely, whereas the principal of the annuities wore out by time, and consequently decreased in value; and in this case, the funds appropriated for payment of these annuities, being chiefly the remnants or surplusages of other funds, had proved so deficient, and were so uncertain, that the Exchequer annuities had been more fluctuating in value, and had sunk more from their original price, than any other Government security whatever. That if the present decree should stand, great inconveniences must arise to merchants and other traders, whose estates often consisting chiefly of annuities and other Government securities, it had been much to their advantage that on any sudden emergency they could readily borrow money for a short time, near to the full value of such securities; but this would be impracticable for the future, because no person would lend, if after the money became payable, the security must be foreclosed, like a mortgage of land." Then it goes on: "Besides, under the sanction of this decree, many persons may be induced to bring bills in Chancery, to redeem their annuities and other Government securities, which had been previously sold for the full value, at the time of such sale; and by this means, an infinite number of suits might be occasioned. That it has always been the known and constant practice, in the case of mortgages of such securities, where the money has been neglected to be paid at the time stipulated, to proceed to a sale on giving eight or ten days notice; yet these annuities were not sold till above two years after the

(1) 5 Bro. P. C. 193, 195.

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money became payable; and after all reasonable application had been used in the mean time, to obtain satisfaction of what was due without selling." To my mind it is plain, both on the judgment of the Lord Chancellor and on the reasons which induced the House of Lords to reverse his actual decision, that the foundation of the rule is that it was a well-known practice two centuries ago that, where stocks and other like securities of a fluctuating value (there were not many of them at that time) were mortgaged, the mortgage carried with it a power of sale after a reasonable time had elapsed for payment of the money, and failure to pay within a reasonable time. No express power of sale was required, and none was given. In my opinion, that is still the law. I adopt the statement of the law in Robbins on Mortgages, and I think it is justified by the decision in *Tucker* v. *Wilson*. (1) These shares are eminently securities of a fluctuating character. The argument of counsel which I have just read, so far as it is founded upon the peculiar character of the security in that case, applies a fortiori to the case of the shares in a gold mine, however advantageous that gold mine may turn out to be. Nobody can say that it is not a fluctuating security. Every reason, therefore, induces me to say that the ordinary rule which is laid down there should apply to the present case. Even if that were not so, in my opinion the letter of August 31, 1897, amounts to a statement by the mortgagees that they deem themselves at liberty to sell at any time they think fit, and at the then market price of the shares. That is not dissented from in any way by the mortgagor. Other shares are bought after that date on the footing of that letter remaining unchallenged. The shares are retained for a very considerable period—many months—and no one can say that a reasonable time has not been given. If it were necessary—and I do not think it is—I should hold that there was in this case a power of sale by agreement between the parties also, and on that ground also the case fails.

The only question that remains is the question of costs. On the issue whether the defendants were entitled to sell, which is

(1) 1 P. Wms. 261.

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the one issue in the action, the plaintiff has failed, and he must pay the costs of the action to that extent. But the defendants were undoubtedly wrong in the position that they originally took up, and the costs down to and including the defence to the action must be paid by them, because I think they were guilty of improper conduct within the exception which allows the Court, in dealing with the costs of a mortgagee, to either direct him to pay, or deprive him of the costs to which he would otherwise have been entitled. There will be a set-off of those costs against the general costs of the action, which the plaintiff will have to pay. There must be an account, but I will direct the account not to proceed unless the parties wish.

Solicitors: *E. F. Weldon; Morley, Shirreff & Co.*

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[1899 B. 3665.]

Company — Winding-up — Bankruptcy — Fraudulent Preference — Surety — "Creditor" — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37; *s.* 48, *sub-s.* 1.

The word "creditor" in s. 48 of the Bankruptcy Act, 1883 (which avoids as a fraudulent preference a charge or payment made by an insolvent debtor "in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference"), means any person who at the date when the charge or payment is made is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. A surety who has a right of proof under s. 37 of the Act in respect of his contingent liability as surety is such a person. A charge, therefore, given to a surety, before he has been called upon to pay as surety, may be a fraudulent preference.

Ex parte Read, [1897] 1 Q. B. 122, is not on this point inconsistent with, and has not been overruled by, *In re Warren*, [1900] 2 Q. B. 138.

WITNESS ACTION.

On August 20, 1897, the plaintiffs, four of the directors of the Blackpool Motor Car Company, Limited, signed a guarantee

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to the Lancashire and Yorkshire Bank for the repayment of all moneys not exceeding 500*l.* due or to become due from the company to the bank. On December 7, 1898, a deed was executed between the company of the one part and the plaintiffs of the other part whereby the company purported to indemnify the plaintiffs against all liability in respect of the guarantee, and to give them as floating security for the payment of everything that might become due thereunder a charge on all the property and undertaking of the company. At this date the account of the company was overdrawn, but the plaintiffs had not been called upon to pay anything under the guarantee, though they subsequently had to pay about 300*l.* to the bank. On December 16, 1898, the company in general meeting passed a resolution to wind up voluntarily. The liquidator refused to carry out the trusts of the deed of indemnity, and the plaintiffs brought an action against him and the company asking for a declaration that they were entitled to be indemnified by the company against all liability under the guarantee, and for a declaration that the deed of indemnity constituted a first charge on the property of the company. The chief ground of defence was that the deed of indemnity was given with the view of giving the plaintiffs a preference over the other creditors of the company at a time when the company was unable to pay its debts as they became due from its own money, and was a fraudulent preference within the meaning of s. 164 of the Companies Act, 1862. The defendants admitted that the plaintiffs were entitled to an indemnity, but submitted that it ought to be made a claim in the winding-up.

The plaintiffs also alleged that the deed of indemnity was executed in pursuance of a previous agreement; but this was denied by the defendants. His Lordship held on the evidence that no such agreement had been proved; and, further, that the insolvency of the company at the time and the intention to prefer the plaintiffs had been established.

H. Terrell, Q.C., and *Hon. Malcolm M. Macnaghten*, for the plaintiffs. Under s. 48 of the Bankruptcy Act, 1883, a charge

is only void as a fraudulent preference if it has been made in favour of a creditor. The word "creditor" means a creditor strictly so called. It does not refer to sureties who have a right in the event of bankruptcy supervening to prove under s. 37 for a contingent liability, but to persons between whom and the bankrupt the relation of debtor and creditor exists. In *Ex parte Kelly & Co.* (1) the transaction was held not to be a fraudulent preference on the ground that the relation between the bankrupts and persons preferred was that of trustee and cestui que trust, and not that of debtor and creditor, although the latter might have proved in the bankruptcy. In *Ex parte Stubbins* (2) James L.J. said that, in order to bring a transaction within the doctrine of voluntary preference of a creditor, "there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor."

That case was followed in *Ex parte Taylor* (3), where Lindley L.J. said that s. 48 did not apply because the relation of debtor and creditor did not exist between a trustee and his cestui que trust or his co-trustee, and the payment in that case, although made to a co-trustee who was also a creditor of the bankrupt, was made, not to prefer him, but to make good a breach of trust.

New, Prance & Garrard's Trustee v. *Hunting* (4) is to the same effect, and was affirmed by the House of Lords sub nom. *Sharp* v. *Jackson.* (5) In that case Lord Halsbury L.C. said (6) that in his opinion the relation of debtor and creditor did exist between a defaulting trustee and his cestui que trust, though there were other and peculiar elements in their

(1) (1879) 11 Ch. D. 306.
(2) (1881) 17 Ch. D. 58, 69.
(3) (1886) 18 Q. B. D. 295, 301.
(4) [1897] 1 Q. B. 607.
(5) [1899] A. C. 419.
(6) Ibid. 426.

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position; but the statement was not necessary for the decision, and did not affect the result of the appeal. These cases shew that the question does not depend upon the right of the plaintiffs to prove in the winding-up, but upon whether they could have maintained an action for debt against the company at the date when the preference was made. At that time they were not creditors in any sense of the word, although they may now be able to prove for their contingent liability under s. 37, sub-s. 3. The only decision to the contrary is *Ex parte Read* (1), and that has been overruled by *In re Warren* (2), which followed *In re Mills.* (3)

[BUCKLEY J. *Ex parte Read* (1) decided that "creditor" in s. 48 means a person who can prove under s. 37, and that that includes a surety. In *In re Warren* (2) and *In re Mills* (3) the decision turned upon the fact that the person intended to be preferred was not the person who received the money. The meaning of "creditor" was not discussed.]

But the remarks of the judges are inconsistent with the decision in *Ex parte Read.* (1) They say that a surety is not a creditor.

[BUCKLEY J. referred to *Poole, Jackson, and Whyte's Case.* (4)]

That was not a question of fraudulent preference, but of the liability of contributories.

Sureties who have not been called upon to pay are not even creditors within s. 37; they are prevented from proving by the rule against double proof. A surety cannot prove in respect of his contingent liability if the principal creditor proves. He can only prove by being subrogated to the rights of his principal. *Wolmershausen* v. *Gullick* (5) does not affect this question, for in that case judgment had been signed against the surety. In *Ex parte Delmar* (6) the principal creditor did not prove; and in *Ex parte Whittaker* (7) Cave J. explained that he did not intend in *Ex parte Delmar* (6) to decide that a surety could prove for his liability before he had paid anything. There-

(1) [1897] 1 Q. B. 122.
(2) [1900] 2 Q. B. 138.
(3) (1888) 5 Morr. 55.
(4) (1878) 9 Ch. D. 322.
(5) [1893] 2 Ch. 514.
(6) (1890) 7 Morr. 129.
(7) (1891) 63 L. T. 777.

fore, s. 48 does not apply to the plaintiffs, and this is not a fraudulent preference.

Tindal Atkinson, Q.C., and *R. Storry Deans*, referred to Williams' Bankruptcy Practice, 7th ed. p. 129, but were not called upon further to argue this point.

BUCKLEY J. stated the facts, and held that the deed of indemnity had not been executed in pursuance of any antecedent agreement, that it was executed with a view of giving the plaintiffs a preference, and that at that time the company was unable to pay its debts as they became due from its own money, and continued:—Then, secondly, it is argued as a matter of law that s. 48 says that charges and payments made "in favour of any creditor or any person in trust for any creditor" shall be void in certain cases, and that these directors were not creditors; that they were only persons who had guaranteed to the bank the overdraft due to the bank; that they had not at this date paid anything, and could not have sued the company; and it is said that "creditor" in s. 48 means a person as between whom and the prospective bankrupt there exists the relation of creditor and debtor, so that the creditor could sue the debtor, and does not mean such a person as, having regard to s. 37 of the Act of Parliament, is capable of proving in respect of a contingent liability.

Upon that, as it appears to me, there is a decision of Vaughan Williams J. which is directly in point, and that is the case of *Ex parte Read.* (1) The facts there were that a bill for 20*l.* had been accepted by one Barnard for the accommodation of the bankrupt, and had been discounted for the bankrupt by his bankers. That bill fell due, and thereupon the bankrupt paid the bank 20*l.* to meet the bill. The object was to relieve Barnard, who was the acceptor; in his examination the bankrupt admitted that he had paid the 20*l.* to meet the bill with a view to prefer Barnard. In that state of facts the trustee in bankruptcy claimed payment from Barnard of 20*l.*, on the ground that the payment of the 20*l.* into the bank to meet the bill was a fraudulent preference by the bankrupt of Barnard

(1) [1897] 1 Q. B. 122, 123.

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within s. 48 of the Bankruptcy Act, 1883. Vaughan Williams J. in giving judgment says this: "I have to decide this question merely upon what seems to me to be the true construction of the Act of Parliament, and I need not trouble myself to distinguish between legal and equitable considerations. Now, Mr. Barnard was a creditor of the bankrupt in the sense that, if bankruptcy supervened, he would have had a right to prove and to share in the distribution of the bankrupt's assets. That being so, what is the meaning of the word 'creditor' in s. 48? The Act contains no definition of the word, and, therefore, to arrive at the meaning I must look at the history of the section. One knows that the doctrine of fraudulent preference was introduced to prevent payments made by insolvent debtors in contemplation of bankruptcy—that is to say, in contemplation of the administration by the Court of the bankrupt's estate rateably amongst those persons who would be entitled to share in the distribution of that estate. In my judgment, when once I arrive at that I must come to the conclusion that the word 'creditor' in s. 48 must mean a person who would be entitled to prove and to share in that distribution. I think the Legislature in enacting the section intended to prevent a payment to anybody who, but for such payment, would share in the administration of the bankrupt's estate. I think, therefore, that the word 'creditor' means any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person. I hold, therefore, that you may make a fraudulent preference by a payment to or for the benefit of a surety who has not yet been called upon to pay as surety. It is not disputed that at the date of the payment into the bank Barnard was a person who had a right of proof under s. 37 in respect of his contingent liability as acceptor of the bill. He had a right, therefore, to share in the distribution of the bankrupt's assets; and under the circumstances I hold that the payment into the bank was a fraudulent preference of Barnard by the bankrupt."

Now, it appears to me that the whole of that judgment is applicable to the case which I have here before me, assuming

that here these directors would be under a contingent liability provable under s. 37. If that is so, it appears to me that this judgment entirely covers the point which I have to decide.

But then it is said that *Ex parte Read* (1) is not consistent with certain other decisions. I am unable myself to find that that is so. The first case upon this which I have to mention is a case of *In re Mills* (2), which is a decision of the Court of Appeal. A payment had there been made by Mills to one Whittaker of a debt for which one Greenwood was surety. It was proved, as a matter of fact, that the object of the bankrupt was to prefer Greenwood, not to prefer Whittaker. Whittaker got the money, not Greenwood. The application was to make Whittaker refund the money, and the Court of Appeal said, No. Lord Esher M.R. in giving judgment says this: "Was it with the intention of giving the creditor a preference that the payment was made? Under the statute it is not sufficient if the debtor paid one creditor in order to favour another. Still less would it be a fraudulent preference if the payment has been made to benefit himself. That has been decided. Still less is it so if the debtor makes the payment to a creditor with intent to advantage someone else who is not a creditor. Here the findings are that the debtor made the payment in favour of Whittaker. True, but what was his intention? It has been found that he did not intend to prefer Whittaker, but to give an advantage to Greenwood. Now Greenwood is not a creditor at all. The case is therefore not within the words of the section, and to hold otherwise would be directly opposite to what was decided in *Ex parte Taylor*." (3) So that the point of *In re Mills* (2) was this, that the person as against whom the application was made was the person who had received the money, but was not the person whom it was intended to prefer. It was intended to prefer another person—namely, the surety for the debt thus paid. *In re Mills* (2) was cited in *Ex parte Read* (1); but it will be noticed that Vaughan Williams J. says not a word about it. In *Ex parte Read* (1) the application as against Barnard succeeded, although he was

(1) [1897] 1 Q. B. 122. (2) 5 Morr. 55, 58.
(3) 18 Q. B. D. 295.

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not the person who had received the money, and upon this, as I shall show presently, the decision has been doubted. But the point which arose in *In re Mills* (1), namely, that the respondent must be the person intended to be preferred, did not arise in *Ex parte Read* (2) at all, for the respondent in *Ex parte Read* (2) was that person. The point argued was whether "creditor" in s. 48 includes a person who is under a contingent liability, which point did not arise and was not argued in *In re Mills*. (1)

The other case which is referred to, *In re Warren* (3), is a case like *In re Mills*. (1) The application there was made against two gentlemen named Warren and Harrison. Warren and Harrison were persons who had joined with the bankrupt in a joint and several promissory note to the Union Loan and Discount Company, who advanced a sum of 250*l*. In other words, Warren and Harrison were sureties, and the application was to make the sureties refund. The 250*l*. had been paid by the bankrupt to the Union Loan and Discount Company. The Court refused to follow *Ex parte Read* (2), in holding that the sureties who had not received the payment could be made to refund. Wright J., after stating that the payment had been made to the Union Loan and Discount Company, the principal creditor, says (4): "that does not make the payment a payment to or in favour of the respondents. The only case that appears to be at variance with this view is that of *Ex parte Read* (2), where I agree that the Court held that the payment, though nominally a payment of the creditor, must be treated as a payment to or in favour of the acceptor of an accommodation bill drawn by the debtor. But in *In re Mills* (1) there are dicta of the Court of Appeal which this Court cannot overlook, although the judgment was founded upon the case of *Ex parte Taylor* (5), which is not reported as deciding any point of this kind. In *In re Mills* (1) the Lords Justices seem clearly to have taken the view that in order to constitute a fraudulent preference the payment must be made to or for the

(1) 5 Morr. 55, 58.
(2) [1897] 1 Q. B. 122.
(3) [1900] 2 Q. B. 138.
(4) Ibid. 140.
(5) 18 Q. B. D. 295.

person intended to be preferred. I think, therefore, that this appeal must be dismissed." So that the cases of *In re Mills* (1) and *In re Warren* (2) are cases which go to shew that where the payment was made to a person whom it was not sought to prefer, you cannot recover by way of fraudulent preference against him because it was not sought to prefer him, nor against the person whom it was sought to prefer because the payment was not made to him or for his benefit. I do not think there is anything inconsistent in that with the decision in *Ex parte Read* (3) that "creditor" in s. 48 means a person who if bankruptcy supervenes can prove.

Some other authorities were referred to which perhaps I ought to mention, although they seem to me to fall under a different head altogether. It must now be taken, after what Lord Halsbury said in the House of Lords in *Sharp* v. *Jackson* (4), that as between trustee and cestui que trust there does exist the relation of debtor and creditor. It was argued for the plaintiffs here that, inasmuch as that is so, and inasmuch as the cases to which I am about to refer held that fraudulent preference did not apply to cases of that description, it is not every creditor who falls within s. 48. Now, in the cases to which I am going to refer, being all of them cases as between trustee and cestui que trust, the position really was this. Take it that there did exist, as between the trustee and cestuis que trust in each of these cases, the relation of debtor and creditor; still there existed another relation, namely, that of trustee and cestui que trust, and these cases only go to shew that by virtue of that higher right you may escape s. 48 of the Act of 1883, although if it were a case of debtor and creditor it may be that the section would apply. The first of them, *Ex parte Kelly & Co.* (5), was a case in which 5300*l.* had been remitted to a firm which subsequently became bankrupt for a specific purpose to meet certain drafts. 3300*l.* of the 5300*l.* found its proper destination; 2000*l.* by an error of a clerk went in a wrong direction. The persons who received the money for the

(1) 5 Morr. 55.
(2) [1900] 2 Q. B. 138.
(3) [1897] 1 Q. B. 122.
(4) [1899] A. C. 419, 426.
(5) 11 Ch. D. 306.

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specific purpose had not the smallest intention of misappropriating it or sending it to a wrong destination. That was purely the fault of a clerk, who paid it into a wrong bank where the firm had an overdraft for which the bankers had a lien. What the Court of Appeal held was that, as the London firm had not intended to misappropriate the 2000*l.*, the relation of trustee and cestui que trust was that which subsisted in respect of it between them and the Glasgow firm; and the London firm ought to have employed the 2000*l.* in meeting the bills; the Court put it on this—that as regards the 2000*l.* the bankrupt firm were trustees for the persons who remitted the money for that specific purpose, and in making good the sum for which they were trustees they were not committing any fraudulent preference within s. 48.

The next case of *Ex parte Stubbins* (1) was a case in which a trustee who had misappropriated the trust funds made good voluntarily on the eve of his bankruptcy the trust money which he had misapplied. It was held that that was not a fraudulent preference. *Ex parte Taylor* (2) was a case of like effect. That was the case in which the point was so much discussed as to the paramount and dominant motive of the bankrupt in making the payment. It was also held that a voluntary payment to make good a breach of trust is not within s. 48.

The last of these cases is reported under the name of *New, Prance & Garrard's Trustee* v. *Hunting* (3), and went to the House of Lords under the name of *Sharp* v. *Jackson*. (4) The decision turned principally upon this—that where you have a trustee who has misappropriated trust moneys, making them good on the eve of bankruptcy, it is or may be impossible to say, and the House of Lords thought from the facts of that case it was impossible there to say that he had done that with a view fraudulently to prefer the cestuis que trust at all. He had done it because, having misappropriated the trust moneys, he was desirous, for his own protection and because it was honest and honourable so to do, to make good that which he

(1) 17 Ch. D. 58.
(2) 18 Q. B. D. 295.
(3) [1897] 1 Q. B. 607; and on appeal [1897] 2 Q. B. 19.
(4) [1899] A. C. 419, 426.

had otherwise misappropriated. I do not see myself that those cases have any bearing on the point which I have to decide here. I think the present case is covered by the decision of Vaughan Williams J. in *Ex parte Read* (1), and I must follow it.

Then it was argued that these sureties were not creditors, and that they had no right of proof under s. 37 of the Bankruptcy Act, 1883, because they had not paid anything. To my mind, the decision in *Wolmershausen* v. *Gullick* (2) and *Ex parte Delmar* (3), notwithstanding what Cave J. said about that case in the case of *Ex parte Whittaker* (4), shews plainly that here these gentlemen, who were sureties for the debt of the company to the bank, were persons who were under a contingent liability which could be the subject of a proof. It seems to me that they are creditors within the definition of s. 48, and the point of law also fails.

Solicitors: *Barton & Pearman, for J. H. Armitage, Leeds; Vincent & Vincent, for John Bowling & Sons, Leeds.*

(1) [1897] 1 Q. B. 122.
(2) [1893] 2 Ch. 514.
(3) 7 Morr. 129.
(4) 63 L. T. 777.

H. C. R.

JOYCE J.
1900
Nov. 1.

THURSTON *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY.

[1900 T. 606.]

Building Society—Infant Borrowing Member—Mortgage for Advances—Repudiation on attaining Twenty-one—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 14, 21, 38.

The Building Societies Act, 1874, s. 13, empowers building societies registered under the Act to make advances to its members by way of mortgage; s. 21 makes the rules of the society binding on all the members; and s. 38 enacts that any person under the age of twenty-one may be admitted a member of the society, unless such admission is prohibited by the rules, and may give "all necessary acquittances."

In 1898 T., a member of a building society registered under the Building Societies Act, 1874, and whose rules enabled infants to become members, obtained advances to enable her to purchase some land and to complete some houses thereon. The transaction was carried out by a conveyance of the land to T., and a mortgage of it by T. to the society in the usual form as security for the advances made and to be made to her. At this time T. was a minor, but this was not known to the society. In 1899 T. attained her majority, and shortly afterwards brought an action against the society to set aside the mortgage as void under the Infants Relief Act, 1874. The society contended (1.) that by virtue of the provisions of the Building Societies Act, 1874, and their rules, the mortgage was valid; and (2.) that in any event T. could not retain the property and at the same time repudiate the charge created by the mortgage:—

Held, without deciding the first question, that the purchase and mortgage were one transaction, and that under the circumstances T. could not retain the property free from the charge upon it for the advances made by the society, including the costs of the action.

Quære, whether an infant borrowing member of a building society registered under the Building Societies Act, 1874, and whose rules enable infants to become members, can execute a valid mortgage to the society for advances.

THIS was an action by a married woman, suing in respect of her separate estate, to set aside a mortgage under these circumstances.

In June, 1898, the plaintiff, a married woman, was on her application duly admitted a member of the defendant society,

who were registered under the Building Societies Act, 1874. Early in July, 1898, she applied on the forms of the society for a loan of 1200*l.* to enable her to purchase the freehold of some land and to complete six houses then in course of erection on the land by her husband, who was a builder. The application was granted, and the transaction was carried out by two deeds executed at the same time, but dated respectively July 21 and 22, 1898. By the deed of July 21 the land was conveyed to the plaintiff in fee simple in consideration of 393*l.* expressed to be paid by her to the vendor out of her separate estate. By the deed of July 22 the plaintiff mortgaged the property to the society in the usual way as security for advances up to 1200*l.*, to be repaid by monthly instalments.

In October, 1898, the society heard for the first time that the plaintiff was a minor. Thereupon they discontinued their advances, took possession of the property, and expended some 268*l.* in completing the buildings, let them, and collected the rents. At the time the society took possession the amount due to them for advances under the mortgage was 1070*l.*, of which 393*l.* had been applied in the purchase of the property, and the balance had been expended on the buildings.

In March, 1899, the plaintiff attained her majority, and shortly afterwards applied by her solicitor to the society claiming the property and repudiating the mortgage. The society declined to give up possession; and in April, 1899, the plaintiff commenced this action, claiming a declaration that the mortgage was void, and that she was entitled to an order for its delivery up to be cancelled, and for delivery of the title-deeds and possession. The society by their defence claimed a lien or charge on the property for all their advances, and offered to deliver up possession and the title-deeds on payment of what was due to them.

The action now came on for trial. It was admitted that the total amount due to the society, after allowing for rents received, was about 1300*l.*, and that the present value of the property was about 1800*l.* It appeared from the certified rules of the society that it was competent for a minor to become a member.

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Badcock, Q.C., and *E. Ford*, for the plaintiff. The defendants do not allege any fraud or misrepresentation by the plaintiff. She acted in good faith, and the mortgage is absolutely void: Infants Relief Act, 1874, s. 1 (1); *Hearle* v. *Greenbank* (2); *Stikeman* v. *Dawson* (3); *Ex parte Jones* (4); *Martin* v. *Gale* (5); *Inman* v. *Inman* (6); *Clements* v. *London and North Western Ry. Co.* (7) But if it is not absolutely void it is voidable, and the plaintiff has not in any way ratified or confirmed it since she attained her majority. It is not a contract for her benefit, and the defendants have no equity which entitled them to go into possession and finish the buildings. They have no lien or charge on the property unless the mortgage is good, and since the Judicature Acts the Court has jurisdiction in such an action as this to order possession and the title-deeds to be given up: *In re Cooper* (8); *Manners* v. *Mew* (9); *In re Ingham.* (10)

Hughes, Q.C., and *G. Broke Freeman*, for the defendants. It is contended that the defendants come within the proviso in s. 1 of the Infants Relief Act, 1874. They are registered under the Building Societies Act, 1874, and their main object, as provided by s. 13 of the Act, is to make advances to their members by way of mortgage. Then s. 21 makes the rules of the society binding on members, and s. 38 enacts that any person under the age of twenty-one may be admitted as a member of the society, unless the rules of the society prohibit such admission, and may give "all necessary acquittances." The rules of the defendants enable minors to become members, and provide that every borrowing member shall

(1) The Infants Relief Act, 1874, s. 1, enacts: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

(2) (1749) 3 Atk. 695, 712.
(3) (1847) 1 De G. & Sm. 90.
(4) (1881) 18 Ch. D. 109.
(5) (1876) 4 Ch. D. 428.
(6) (1873) L. R. 15 Eq. 260.
(7) [1894] 2 Q. B. 482.
(8) (1882) 20 Ch. D. 611.
(9) (1885) 29 Ch. D. 725.
(10) [1893] 1 Ch. 352.

execute a mortgage for advances. The effect of the Act and the rules together is that any infant member may do any act and execute any deed as a member which is authorized by the Act and rules. One of such acts is borrowing money on mortgage. The plaintiff, therefore, is liable to repay all the advances made on the property. There is no authority on the point, but in *Dennison* v. *Jeffs* (1) it was held that an infant member of a building society could sign the deed of dissolution of the society. Next, apart from the Building Societies Act, it is submitted that the purchase and mortgage of the property were one transaction, and that the plaintiff cannot affirm one part of the transaction and disaffirm the other part. The purchase could not have been completed without the advances made by the society, and the mortgage for the advances was a necessary part of the transaction, without which it would not have been carried through. The Infants Relief Act, 1874, is not intended to hit contracts made for the benefit of infants. This contract is a beneficial one for the plaintiff, and there is a substantial value in the equity of redemption. The defendants do not desire foreclosure, nor do they claim that the plaintiff is liable on her personal covenant to pay in the mortgage deed. That remedy is probably gone. But they contend that the plaintiff cannot retain the property acquired with their moneys, and at the same repudiate the charge created by the mortgage for all their advances: *Holmes* v. *Blogg* (2); *Valentini* v. *Canali* (3); *Cork and Bandon Ry. Co.* v. *Cazenove* (4); *North Western Ry. Co.* v. *M'Michael* (5); *Walter* v. *Everard* (6); *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* (7)

Badcock, Q.C., in reply. The plaintiff is not seeking any equitable relief, but is relying on her strict legal rights. The words "to give all necessary acquittances" in s. 38 of the Building Societies Act, 1874, merely authorize infants to give receipts for money, and do not enable them to execute deeds. If the Legislature had intended to give them power to execute

(1) [1896] 1 Ch. 611.
(2) (1818) 8 Taunt. 508; 19 R. R. 445.
(3) (1889) 24 Q. B. D. 166.
(4) (1847) 10 Q. B. 935.
(5) (1850) 5 Ex. 114.
(6) [1891] 2 Q. B. 369.
(7) [1894] 3 Ch. 589.

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deeds it would have done so expressly, as in the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15, sub-s. 8, where the words are "execute all instruments and give all acquittances necessary to be executed or given under the rules." Similar words occur in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 9, and in the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 11, sub-s. 9.

JOYCE J. The facts of this case are simplicity itself. A young married woman applies to a building society in the ordinary way to become a member of the society, and also applies for an advance to be made to her in order to enable her to make a purchase of some land and to complete the buildings upon it. She becomes a member of the society, and then the society advance the money to purchase the land which she wished to buy, and afterwards make further advances which are expended in completing the buildings upon the property. It is quite true that the transaction is carried out by deeds which are dated on different days, namely, on July 21 and 22; but nevertheless the transaction was all one. It now turns out that this young married woman was not of age at the time when the advances were made. It seems to me that the case is capable of being decided, and ought to be decided, on the short and simple ground that the transaction for the purchase of the land and the advances of the money was all one transaction, and that the plaintiff cannot repudiate one part of the transaction and affirm and take the benefit of the other part. This is an action brought by the lady, who has not paid anything herself, seeking to keep the property which has been purchased and paid for by the money of the building society, and to have that property free from any claim or lien on behalf of the building society. In my opinion that is a claim which cannot be sustained. I think it is exactly the one thing she is not entitled to, and this being so, and Mr. Hughes informing me that he does not desire, on behalf of the society, to enforce the plaintiff's personal covenant for payment, I hold that the plaintiff is not entitled to this property free from the charge of the building society.

It is not necessary for me to decide the question raised on the provisions of the Building Societies Act, 1874, and the rules of the society. I should hesitate to decide that an infant can enter into a mortgage to a building society and be bound by all the provisions in the mortgage deed. But it is not necessary for me to decide that question in this case. I hold that an infant, in the position of this lady, cannot in this court, or in any other court, I hope, retain the property which has been obtained and paid for in the way I have stated without recognising the lien or charge of the building society on the property for the amount due to them for the advances they have made. The result is, that this action must be dismissed, and the defendants are entitled to add their costs of the action to their security.

Solicitors for plaintiff: *Beyfus & Beyfus.*

Solicitors for defendants: *Peacock & Goddard, for Rothera & Sons, Nottingham.*

H. L. F.

In re HARE AND O'MORE'S CONTRACT.

[1900 H. 1647.]

Vendor and Purchaser—Conditions of Sale—Misleading Particulars—Statement by Auctioneer—Compensation—Specific Performance.

A clear and distinct statement by an auctioneer at the time of sale verbally correcting a material misdescription in the particulars disentitles the purchaser to specific performance with compensation for that misdescription, even if he does not hear the statement.

Manser v. *Back*, (1848) 6 Hare, 443, followed.

VENDOR AND PURCHASER SUMMONS.

This was a summons by the purchaser under the above contract asking for a declaration that he was entitled to compensation for misdescription of the property therein comprised.

A number of leasehold houses were sold in lots by auction on March 23, 1900. The particulars of sale described lots 4 and 5 as follows:—

"Lot 4. Highfield Road, Saltley.—Four Capital Private

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Houses, each with hall entrance, garden, and outbuildings in the rear, adjoining lot 3, and called 'Eastbourne,' and producing at low rents 72*l.* 16*s.* per annum. Term eighty-five years from Midsummer next. Ground-rent 12*l.*

"Lot 5. Highfield Road, Saltley.—Four Similar Houses, called 'Somerville,' situate in the Highfield Road, adjoining the last lot; let to tenants of long standing, at old-fashioned rents producing 67*l.* 12*s.* a year. Leasehold for eighty-five years from Midsummer next. Ground-rent 12*l.*"

Condition 14 provided as follows:—

"Any error, misstatement, or omission in the particulars shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, which shall be allowed by the vendor or purchaser as the case may require. The amount of such compensation in case of dispute shall be settled by the auctioneer, whose decision shall be final."

The purchaser inspected lot 4 before the sale, and found that the houses had entrance-halls and water-closets.

He attended the sale, and purchased lot 5 for 580*l.* in reliance, as he asserted, on the statement in the particulars that the houses were similar houses to those of lot 4, whereas it was found that the houses of lot 5 had no entrance-halls, and had privies in lieu of water-closets, the rent being less in consequence than that of the houses in lot 4. He thereupon claimed 77*l.* compensation for the misdescription.

The vendor alleged that, before putting up lot 5 for sale, the auctioneer made a verbal statement correcting the misdescription, which the purchaser must have heard, and one of the requisitions made on behalf of the purchaser asked for a written statement by the auctioneer of what he had said at the sale. This was furnished; but at the trial the purchaser denied that any such statement was made, or, if made, that he heard it.

The evidence on the point being conflicting, the summons was ordered to be set down as a witness action, the purchaser to be treated as plaintiff in an action for specific performance with compensation.

On hearing the evidence, the Court found that the statement

had been made clearly and distinctly, but that it was not proved that the purchaser had heard it.

The question was, therefore, whether on that finding the purchaser was entitled to specific performance with compensation.

Jolly, for the purchaser. The verbal statement of the auctioneer at the time of sale is not admissible as evidence to vary the printed particulars: *Gunnis* v. *Erhart* (1), approved in *Ogilvie* v. *Foljambe* (2); Dart on Vendors and Purchasers, 6th ed. p. 124; at all events, as against a purchaser who did not hear the statement: *In re Edwards to Daniel Sykes & Co., Limited.* (3) In the present case the contract was signed without any amendment, and the purchaser, whether he heard the statement or not, is entitled to specific performance with compensation under condition 14: *Lett* v. *Randall.* (4)

Hewitt, for the vendor. *Gunnis* v. *Erhart* (1) was an action on the case. A parol variation is always admitted as a defence to a specific performance action: *Marquis Townshend* v. *Stangroom* (5); *Winch* v. *Winchester* (6); Sugden on Vendors and Purchasers, 14th ed. pp. 161, 162; and for this purpose it is immaterial whether the purchaser heard the auctioneer's statement or not: *Manser* v. *Back.* (7) *In re Edwards to Daniel Sykes & Co., Limited* (3), goes to shew, if anything, that a purchaser must be taken to have heard an auctioneer's statements made in his presence.

In *Lett* v. *Randall* (4) there was no attempt to correct the particulars. The vendor merely relied on the purchaser's supposed knowledge of the true state of things.

Jolly, in reply. In *Manser* v. *Back* (7) the purchaser was refused specific performance of the unamended contract, on the ground of mistake, hardship, and revocation of the auctioneer's authority to sign that contract. It was a very strong decision, and does not appear to have been expressly followed in any subsequent authority.

Cur. adv. vult.

(1) (1789) 1 H. Bl. 289; 2 R. R. 769.
(2) (1817) 3 Mer. 53; 17 R. R. 13.
(3) (1890) 62 L. T. 445.
(4) (1883) 49 L. T. 71.
(5) (1801) 6 Ves. 328; 5 R. R. 312.
(6) (1812) 1 V. & B. 375; 12 R. R. 238.
(7) 6 Hare, 443.

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Nov. 14. JOYCE J. The question is whether, when a statement correcting a material misdescription in the particulars has been made clearly and distinctly by the auctioneer at the time of sale, but the purchaser is not shewn to have heard that statement, the circumstances are such as to render it inequitable to grant the purchaser specific performance with compensation for the misdescription. The vendor relied on *Manser* v. *Back* (1), and I reserved judgment in order to consider that case, which, it was suggested, had not been followed in any subsequent authority.

I think that *Manser* v. *Back* (1), if good law, is a clear authority for relieving the vendor from the contract in such a case as this. In *Manser* v. *Back* (1) there was a distinct verbal statement by the auctioneer in the auction room, which the purchaser did not hear, and it was held that it was inequitable to enforce specific performance of the contract on the vendor without the verbal modification introduced by the statement. I do not find that *Manser* v. *Back* (1) has ever been questioned, or disapproved. On the contrary, it was cited with approval by Baggallay L.J., sitting for Malins V.-C., in *Tamplin* v. *James*. (2) It is treated as good law in all the text-books, and, if I may say so, I entirely agree with the decision.

That being so, I have come to the conclusion that the vendor cannot be compelled to specifically perform this contract with compensation.

Lett v. *Randall* (3), on which the purchaser relied, does not affect the present case, the only point decided being that the mere fact that the purchaser knew of a misdescription in the particulars did not preclude him from enforcing specific performance with compensation; while in *In re Edwards to Daniel Sykes & Co., Limited* (4), there was no evidence that the purchaser did not hear the verbal statement, and Chitty J. held as a fact that he must be taken to have heard it. In this case, therefore, I cannot enforce specific performance with compensation against the vendor; and, as the purchaser does not wish to complete without compensation, I will rescind the contract, order the return of the deposit with interest, and give

(1) 6 Hare, 433.
(2) (1880) 15 Ch. D. 215, 217, 218, 219.
(3) 49 L. T. 71.
(4) 62 L. T. 445.

the purchaser the costs of investigating the title down to the time he was furnished with the written statement of the auctioneer. Subject to this, I dismiss the summons without costs.

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Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Lowe & Jolly, Birmingham; Preston, Stow & Preston, for Jacob Rowlands & Sons, Birmingham.*

G. R. A.

In re UNITED SERVICE ASSOCIATION.

WRIGHT J.
1900
Nov. 7, 10.

[00273 of 1900.]

Company—Winding-up—Contributory—Enforcing Payment of Calls made before Winding-up—Application to stay Proceedings till Costs of Discontinued Action by Company paid—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 101—*Rules of Supreme Court*, 1883, *Order* XXVI., *rr.* 1, 4.

A company, while a going concern, sued Y. for calls on shares alleged to be held by him. Before the action was ripe for trial the company resolved on voluntary winding-up, and the liquidator settled Y. on the list of contributories in respect of the amount of the calls. The liquidator then by notice discontinued the action, and took out an originating summons against Y. under ss. 101 and 138 of the Companies Act, 1862, for a balance order in respect of the calls. Y.'s costs of the action having been taxed, and the liquidator having refused to pay them, Y. applied for a stay of the originating summons until payment:—

Held, that Y. was not entitled to the stay, but that the amount of the costs must be deducted from any sum recovered by the liquidator on the originating summons.

Cook v. *Hathway*, (1869) L. R. 8 Eq. 612, and *M'Cabe* v. *Bank of Ireland*, (1889) 14 App. Cas. 413, distinguished.

THE United Service Association, Limited, on September 6, 1899, commenced an action in the Queen's Bench Division against John Young, and by the statement of claim indorsed on the writ claimed from him 375*l.*, alleged to be due from him as the holder of 500 shares in the company, and on September 14, 1899, issued a summons under Rules of Supreme Court, 1883, Order XIV., for liberty to sign final judgment. On September 27 Young obtained leave to defend the action, and

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an order for discovery of documents on giving the necessary security for costs, and the action was ordered to be placed in the short cause list. On October 3, 1899, Young gave the security ordered, but no discovery was given, and Young obtained an order that the action should not be set down and heard until after discovery had been given. On May 14, 1900, the company passed an extraordinary resolution for voluntary winding-up, and appointed J. E. Meadowcroft, the secretary of the company, liquidator.

The liquidator applied to Young for payment of the 375*l.*, and in June, 1900, after notice, settled him on the list of contributories in the winding-up.

On July 31, 1900, the liquidator gave notice of discontinuance of the action, and issued an originating summons in the winding-up under ss. 101 and 138 of the Companies Act, 1862, for an order on Young to pay the 375*l.* and interest and costs.

Young's costs of the action were taxed and allowed at 13*l.* 1*s.* 2*d.*, but the liquidator declined to pay them.

Young took out a summons in the winding-up, asking (1.) that all further proceedings under the originating summons might be stayed until payment of the 13*l.* 1*s.* 2*d.*; (2.) that the liquidator might be ordered to give security for the costs of the originating summons, and that further proceedings in it might in the meantime be stayed; (3.) that if the liquidator paid the 13*l.* 1*s.* 2*d.* and gave the security asked for, he might be ordered to make an affidavit of documents, and produce and allow inspection of documents.

The company's only asset consisted of the alleged liability of Young.

The summons to stay proceedings was adjourned into court, and was heard on November 7 and 10, 1900.

Giveen, in support of the summons. As regards the applications to stay the liquidator's proceedings, the case is very like that in which a plaintiff has become bankrupt and his trustee revives the action, except that the liquidator's position is less favourable, because he is only the agent of the company,

whereas the trustee succeeds in interest by operation of law. In *Cook* v. *Hathway* (1), where a plaintiff who had been ordered to pay costs in a suit became bankrupt and his assignee revived the suit, the Court made an order staying all further proceedings until the assignee had paid the costs ordered to be paid by the plaintiff. Malins V.-C. in his judgment refers to *Horlock* v. *Priestley* (2)—where Shadwell V.-C. held that an executor who had revived a suit could not be allowed to go on without paying the costs for which his testator was liable—and other cases, and says (3): "All these cases proceed on the same principle, that" if a person "comes in by representation, whether it be as an assignee in bankruptcy, or as an executor or administrator of an original plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid." And both in England and Ireland it has been held to be part of the inherent jurisdiction of the Court to stay proceedings where a prior action has been brought, substantially asserting the same rights against the same parties in the same or another Court, until the costs of the prior action have been paid: *M'Cabe* v. *Bank of Ireland.* (4)

The same rule has been expressly applied to cases where the prior action has been discontinued: Rules of Supreme Court, 1883, Order XXVI., r. 4.

The liquidator is not an officer of the Court, but only an agent of the company. He is, therefore, really the company itself; and as the company, being in liquidation, is primâ facie insolvent, it ought to be ordered to give security for the costs of the originating summons: *In re W. Powell & Sons* (5); *In re Western Counties Bakeries, &c., Co.*, before Stirling J. in chambers, cited in Palmer's Company Precedents, 8th ed. Pt. II. p. 589.

The liquidator is in the position of any other litigant, and ought, therefore, to be ordered to give discovery of documents.

Martelli, for the liquidator. It is not disputed that the

(1) L. R. 8 Eq. 612.
(2) (1837) 8 Sim. 621; 42 R. R. 247.
(3) L. R. 8 Eq. 618.
(4) 14 App. Cas. 413, 416.
(5) [1896] 1 Ch. 681.

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general rule is that the costs of abandoned proceedings must be paid before the person who commenced them can take proceedings against the same person in respect of the same matter, or that there is no exception to the rule where there has been a change of interest. But the present case is not within the rule. The company is not now taking proceedings, and the liquidator, who is a totally different entity, represents not only the shareholders, but the creditors whose rights have intervened by the winding-up. He was acting properly in discontinuing the action, for defences could be raised in it which are not available in proceedings in the winding-up to make a person liable as a contributory. The liquidator is only using the machinery to compel payment which is provided by s. 101 of the Companies Act, 1862. As to the costs of the action, Young is only a creditor of the company, and must prove for the costs in the winding-up. [He was stopped as to the application for a stay until payment of the costs of the action, and was not called upon as to the application for security for costs.] As to discovery, the liquidator is willing to produce all documents to the applicant, and to allow him to inspect anything he wants to see.

Giveen, in reply. The applicant, if right, is a successful litigant, and therefore is primâ facie entitled to be paid his costs of the discontinued action in full, and ought not to be placed in competition with other creditors who became such before the winding-up: *In re London Metallurgical Co.* (1) The same case shews that there is no hardship on a liquidator in ordering him to pay costs, because if he has no assets he ought to get the creditors to provide an indemnity fund. (2) The same principle applies to an order against him for security for costs, and to an order imposing on him the condition that he shall pay the costs of a discontinued action before proceeding against the same defendant to recover the amount claimed in the action.

If an order for security for costs is refused, it should only be on the condition of the liquidator acknowledging his personal liability to pay costs if ordered to do so.

(1) [1895] 1 Ch. 758, 763. (2) [1895] 1 Ch. 768.

WRIGHT J. I have already dealt with the application that the liquidator may be ordered to give security for costs, and have refused to order him to do so. As regards the application that he may be ordered to give discovery, I understand that he undertakes to produce and give the applicant inspection of all documents relating to the matters in question in the summons.

The application that the liquidator's proceedings by originating summons may be stayed must be refused, for I do not think that the case comes within the principle of the authorities cited on behalf of the applicant. There is nothing vexatious in the ordinary statutory proceedings which the liquidator is now taking. He was not bound to go on with the action commenced by the company, and he seems only to have been doing his duty when he discontinued that action. There is no analogy between this case and that of oppressive litigation or proceedings being continued by a person who succeeds to a plaintiff's interest as his representative. I must take it that the action was properly brought, but that it was rightly discontinued, and I cannot say that the liquidator's proceedings by way of originating summons ought to be stayed unless he pays the costs of an action which he did not begin himself. The effect of that would be to give the present applicant his full costs of the action, instead of leaving him to prove for the amount in the liquidation. The case may, no doubt, be one of hardship, but it is a hardship which is caused by the liquidation, and not by any fault of the liquidator. The 13*l.* costs in the action ought to be allowed to the applicant out of any moneys which the liquidator may recover against him. The costs of the present application will be liquidator's costs in the originating summons.

Leave to appeal refused.

Solicitors for applicant: *Harwood & Stephenson.*
Solicitors for liquidator: *Poole & Robinson.*

F. E.

WRIGHT J. 1900 Nov. 14.

In re ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY.

[00328 of 1900.]

Building Society—Unincorporated Society certified after 1862 *and before* 1874 *—Repeal of Statute under which Certified—Illegal Company—Jurisdiction to Wind up—Building Societies Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 32)—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 4, 199—*Building Societies Act*, 1874 (37 *&* 38 *Vict. c.* 42), *s.* 40—*Building Societies Act*, 1894 (57 *&* 58 *Vict. c.* 47), *s.* 25.

A building society was established and certified in 1868 under the Building Societies Act, 1836, but was never incorporated. By s. 25 of the Building Societies Act, 1894, the Act of 1836 was repealed as from August, 1896, as to all societies certified under it after 1856.

Early in 1900 the society was found to be insolvent, and a winding-up petition was then presented against the society, but C., one of its creditors, did not appear on that petition, which was withdrawn, all the other undisputed creditors of the society agreeing to accept 12*s.* 6*d.* in the pound, which was paid to them. There was nothing for distribution amongst the shareholders, as the assets when sold did not realize enough to pay the composition. The balance of this was provided by the directors out of their own pockets, and they took an assignment of the claims of the assenting creditors, and retained in hand enough to pay and offered C. 12*s.* 6*d.* in the pound on his debt.

C. refused the offer, and petitioned for a winding-up order, alleging irregularities by the society's officers, and that an investigation into its affairs was necessary. The Court was of opinion that nothing substantial would result from a winding-up order :—

Held, on the facts above stated, that the petition must be dismissed.

Semble, that, the Act of 1836 having been repealed, the society came within the class of companies forbidden by s. 4 of the Companies Act, 1862, and that there was no jurisdiction to wind it up under the Companies Acts :—

Held, also, that the society had no status to ask to be paid its costs of the petition while it relied on this point against the petitioner.

THE above-named society was established under 6 & 7 Will. 4, c. 32 (the Building Societies Act, 1836), in March, 1868, and on the 3rd of that month was certified as a building society under that Act.

The society commenced and continued business and received subscriptions from and made advances to its members, and

also received considerable sums of money in loans from depositors.

Notwithstanding the provisions of subsequent Building Societies Acts set forth and referred to below, the society was never incorporated.

By s. 7 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), the Act of 1836 was repealed, "but this repeal shall not affect any subsisting society certified under the said Act, until such society shall have obtained a certificate of incorporation under this Act," and the section required subsisting societies which had not so obtained certificates of incorporation to send to the Registrar of Friendly Societies documents formerly sent to the clerk of the peace.

Sect. 9 of the Act of 1874 is as follows: "Every society now subsisting or hereafter established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession, until terminated or dissolved in manner herein provided, and a common seal."

By s. 10, on the commencement of the Act of 1874 (Nov. 2, 1874), all transcripts of rules of societies certified under the Act of 1832, and filed with the rolls of the sessions of the peace of any county, &c., were, on a proper application, to be transmitted to the registrar, to be by him kept and registered, and upon such requisition "every such subsisting society shall be entitled to a certificate of incorporation on application to the registrar."

Sect. 11 provided that if a transcript of rules was not transmitted under s. 10, a subsisting society should, on producing to the registrar a certified copy of the rules, authenticated in the manner required, "be entitled to a certificate of incorporation."

Sect. 12 provided that a certificate of incorporation under the Act of 1874 should not be granted to an existing society except upon application to the registrar made by authority of a general meeting of the society specially called for the purpose.

Sect. 40 of the Act of 1874 required societies under that Act to make certain annual audits and statements.

By the Building Societies Act, 1875 (38 & 39 Vict. c. 9), the

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following provision (s. 2) was substituted for s. 8 of the Act of 1874, which contained some words inserted by inadvertence and was accordingly repealed: "From and after the passing of this Act every society the rules of which have been certified under the" Act of 1832 "may obtain a certificate of incorporation under the Building Societies Act, 1874, and thereupon shall be deemed to be a society under that Act; and its rules shall, so far as the same are not contrary to any express provisions of that Act, continue in force until altered or rescinded as in that Act mentioned."

The Building Societies Act, 1894 (57 & 58 Vict. c. 47), received the Royal assent on August 25, 1894, and provided as follows:—

"25.—(1.) Sect. 40 of the Building Societies Act, 1874, shall apply to every society which has been certified under the Building Societies Act, 1836 (that is to say, the Act of the session held in the sixth and seventh years of King William the Fourth, chapter thirty-two, intituled 'An Act for the Regulation of Benefit Building Societies') and has not been incorporated under the Building Societies Act, 1874, and exists at the passing of this Act, and if any such society fails to comply with the requirements of that section, the society and its members and officers shall be subject to the like penalties as if the society were a society under the Building Societies Acts.

"(2.) On the expiration of two years from the passing of this Act, the said Building Societies Act, 1836, shall be repealed as to all societies certified thereunder after the year one thousand eight hundred and fifty-six."

The society was for some years supposed to be in a flourishing condition; but in March, 1900, one Braund, the secretary of the company, made a confession to the directors. An investigation of the accounts followed, which shewed that the society was insolvent, and Braund was prosecuted for embezzling moneys of the society and sentenced to penal servitude.

The investigation also shewed that the society owed to the depositors sums amounting to over 8000*l.*, part of which had been lent to the society after August 25, 1896 (two years after the passing of the Building Societies Act, 1894).

The assets of the society consisted principally of moneys

owing to it by borrowing members on mortgages, and were estimated to be of sufficient value to enable the society to pay a dividend of about 12*s.* 6*d.* in the pound to the depositors. The directors made an offer to the depositors to buy up their deposits at a sum equal to 12*s.* 6*d.* in the pound on the amount of their deposits, a form of agreement for sale was prepared, and all the depositors whose claims were undisputed, except Joseph Channing, agreed to sell their deposits on the terms therein mentioned.

The agreement was completed with each depositor, and the purchase-money paid, except in four cases which awaited completion, the purchase-money being in these cases deposited in the meantime in a bank. As a further part of the scheme for winding up the society, a deed of dissolution was prepared, and was executed or assented to by ninety members of the society. This deed provided that the assets should be applied in paying off the depositors, and that the conduct of the winding-up should be left in the hands of the directors and auditors.

The assets did not realize sufficient to pay the dividend agreed upon, and the balance of 823*l.* necessary to make up the amount was paid by the directors and auditors out of their own pockets.

A winding-up petition against the society was presented by two depositors in March, 1900, but before the hearing they agreed to sell their deposits on the terms above mentioned, and the petition was withdrawn. Channing knew of this petition, but did not give any notice of his intention to appear at the hearing of it, and did not appear to support it.

His deposit with the society amounted to 620*l.*, and, after declining an offer of 12*s.* 6*d.* in the pound on it, he petitioned for a winding-up order against the society, the petition alleging that an inquiry was desirable into the matters relating to the failure of the society and the conduct of its business by its directors, auditors, and other officers, including in such matters the loss of capital moneys through alleged negligence and breach of duty, the preparation and publication of balance-sheets said to be false and misleading, and the alleged payment of interest out of capital. The petition further stated that it

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was just and equitable that the society should be wound up by the Court.

During the argument at the hearing of the petition it was stated that out of fifty-eight shares in the society, twenty-seven were held by directors and seventeen by members of a director's family.

Waggett (*H. Terrell, Q.C.*, with him), for the petitioner. The society is insolvent, an investigation into its affairs is necessary, and the petitioner is an unsatisfied creditor. He has, therefore, shewn a primâ facie case for a compulsory winding-up order.

Swinfen Eady, Q.C., and *G. R. Northcote*, for the society and its directors and auditors. Assuming for the moment that the Court has jurisdiction to make a winding-up order, no sufficient case has been shewn by the petitioner. He is not supported by any of the other creditors whose claims are undisputed; his case as to an investigation being required is shadowy, and no substantial benefit can result to any one from a winding-up order.

But the Court has no jurisdiction to make the order asked for. The society, although it had a legal origin, has become and is now an illegal society. It was properly established and certified under the Building Societies Act, 1836. And, although it did not, as it might have done, obtain a certificate of incorporation under the Building Societies Act, 1874, or the Act of 1875, s. 7 of the Act of 1874 preserved the Act of 1836 from repeal in the case of this society. Sect. 25 of the Building Societies Act, 1894, gave the society two years' grace within which it might have obtained incorporation; but at the end of the two years—namely, on August 25, 1896—as it had neglected to obtain a certificate of incorporation, and the Act of 1836, under which it was established, was from that time repealed as regards societies certified thereunder after the year 1856, this society became an illegal one. It was then illegal, because by s. 4 of the Companies Act, 1862, no association consisting of more than twenty persons was to be formed after August 7, 1862, for the purpose of carrying on any business other than bank-

ing, that had for its object the acquisition of gain by the association or the individual members thereof, "unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is" a mining company within the Stannaries jurisdiction. On August 25, 1896, the Act of 1836 being repealed, the society was not formed in pursuance of any existing statute; its statutory title was gone, and it had become an illegal society. It is no longer a certified, and is not an incorporated society. The Court has no jurisdiction to wind up an association which has no legal existence, for s. 199 of the Act of 1862, which provides for the winding-up of companies not registered under that Act, only applies to something which can be lawfully formed: *In re Padstow Total Loss and Collision Assurance Association.* (1) A society which was originally legal may become illegal, and so incapable of being wound up under s. 199 of the Act of 1862, e.g., by having ceased to have more than seven members: *In re Bowling and Welby's Contract.* (2)

Darley, for a shareholder opposing the petition.

Gore-Browne, for an alleged depositor whose claim was disputed. The society is a lawful one. Assuming that it is one of the associations, &c., not registered under the Companies Act, 1862, which are named in s. 4 of that Act, it was formed "in pursuance of some other Act of Parliament"—namely, the Building Societies Act, 1836—and is not, therefore, an illegal society.

Sect. 25 of the Building Societies Act, 1894, although it repeals the Act of 1836, does not say that societies certified under that Act are by the repeal of it to become illegal.

And by s. 38, sub-s. 2, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), where any Act subsequent thereto "repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . affect the previous operation of any enactment so repealed or anything duly done . . . . under any enactment so repealed . . . . or affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." No contrary intention appearing, the

(1) (1882) 20 Ch. D. 137, 143. (2) [1895] 1 Ch. 663.

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certification of the society under the Act of 1836 remains, and its rights and its liability to be wound up are untouched by the repeal.

H. Terrell, Q.C., and *Waggett*, for the petitioner, on the legal points raised. The society was formed in 1868 under the then existing Act of 1836. There was nothing illegal in that. The Act of 1836 remained unrepealed, as regards this society, until 1896. Assuming that as from August, 1896, the society had not the protection of the Act of 1836, s. 25 of the Act of 1894 does not say that the repeal is to render societies under the Act of 1836 illegal. Moreover, a society cannot set up its own illegality. If the society has become illegal, it must have been by the operation of s. 4 of the Companies Act, 1862; but that section expressly excepts societies "formed in pursuance of some other Act of Parliament." This society was certainly so "formed," and the fact that the Act under which it was formed has been repealed cannot affect its legality. In that section the word "formed" must be read in its natural sense—that is to say, originally formed: *Shaw* v. *Simmons*. (1)

In the *Padstow Case* (2) the association consisted of more than twenty members. It was formed after the commencement of the Act of 1862, and not in pursuance of any other Act, and was clearly an unlawful society.

In *In re Bowling and Welby's Contract* (3) the society had less than seven members, and was, therefore, not an unregistered company of the sort to which s. 199 of the Act of 1862 relates.

As to the merits, the petitioner has shewn a primâ facie case of misfeasance, and that a thorough and independent investigation is required; and that investigation can only be obtained by means of a compulsory winding-up order. The onus lies on those who say that a compulsory order will be useless to prove that that view is correct: *In re Krasnapolsky Restaurant and Winter Garden Co.* (4)

The question whether the shareholders are not liable, beyond the amount of their shares, to contribute enough to pay the

(1) (1883) 12 Q. B. D. 117.
(2) 20 Ch. D. 137, 143.
(3) [1895] 1 Ch. 663.
(4) [1892] 3 Ch. 174.

creditors in full is one which the petitioner is entitled to have decided: see *In re West London and General Permanent Benefit Building Society* (1); *Murray* v. *Scott*. (2)

The directors and auditors are liable for neglecting to have the books and accounts properly audited: *In re Oxford Benefit Building and Investment Society* (3); *Leeds Estate, Building and Investment Co.* v. *Shepherd*. (4)

W. H. Draper, for two shareholders supporting the petition.

Swinfen Eady, Q.C., in reply. An unpaid creditor of a company is not entitled to a winding-up order unless he can shew that, not only he, but also the general body of creditors will be benefited by it: *In re Greenwood & Co.* (5)

[WRIGHT J. Is not that decision inconsistent with several other authorities?] (6)

The ex debito justitiæ rule does not apply where no benefit can accrue to the petitioner from a winding-up order: *In re Chapel House Colliery Co.* (7); *In re Uruguay Central and Hygueritas Ry. Co. of Monte Video*. (8)

WRIGHT J. This is a case of very great difficulty, and for a long time I was greatly in doubt as to what conclusion I should come to.

I will deal first with what I may call the merits of the case. The society is an old building society, and for a long time it was supposed to be in a flourishing condition. Whether it was so or not I have not the means of knowing, but a short time ago its secretary misappropriated a large portion of its funds and the society was found to be insolvent. The directors found that by contributing some 800*l*. of their own and having all the assets of the society sold they would be in a position to offer 12*s*. 6*d*. in the pound to the creditors of the society, all of whom were in a sense, as I understand, members of the society. All

(1) [1894] 2 Ch. 352.
(2) (1884) 9 App. Cas. 519.
(3) (1886) 35 Ch. D. 502.
(4) (1887) 36 Ch. D. 787.
(5) [1900] 2 Q. B. 306.
(6) See *In re Western of Canada Oil, Lands and Works Co.*, (1873) L. R. 17 Eq. 1; *Bowes* v. *Hope Life Insurance Co.*, (1865) 11 H. L. C. 389; *In re West Hartlepool Iron-works Co.*, (1875) L. R. 10 Ch. 618.—F. E.
(7) (1883) 24 Ch. D. 259.
(8) (1879) 11 Ch. D. 372.

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the creditors whose claims are undisputed, except one who is the present petitioner, accepted that offer. The present petitioner thought—and I do not blame him for thinking—that, considering the imputations which he fancied he was in a position to make against the directors, his claim was worth 15*s.* in the pound, and he refused to take less, and now he petitions to wind up the company. The petition contains only very general charges of misconduct or negligence against the directors or officers of the company, and it was supported simply by the ordinary statutory affidavit, which, of course, is quite insufficient to establish charges of that kind. There was no other affidavit of any sort, and no other affidavit of any kind was produced in support of any charges of the sort until the hearing to-day, and the respondents had never seen those affidavits until, by leave, they were used in court, rather for the purpose of seeing whether an adjournment ought to be granted than for any other purpose. However, they are in evidence now. The evidence of misconduct is very weak and vague, and mostly founded on hearsay, and to my mind there is nothing in it. In my judgment no case on which I ought to act is shewn which would lead me to think that misfeasance proceedings against the directors, at any rate, would have any effect, and, as regards the auditors, I am told that they were a poor schoolmaster and a rate-collector without much means, and I cannot think that there would be any substantial result from proceeding against them.

Mr. Rowe, the director whose conduct is primarily impugned, has been cross-examined. I accept his evidence, and I think that there is no reason to suppose that there was any grave misconduct on his part, or, so far as I can see, on the part of the other directors, unless it be on one point, and that is that they seem to have taken on themselves to dispense with the rules of the society as to fines being paid by persons who were in arrear in the repayment of their advances. I am unable to see upon the evidence before me that there is likely to be any substantial asset forthcoming in respect of that matter. There might be something, but I am not in a position to say that there is any likelihood of a substantial asset. That being so,

I come to the conclusion that in all probability there would not be any substantial gain from misfeasance proceedings.

Then how does the matter stand? The funds of the society have been augmented out of the pockets of the directors, and have been distributed, except that, as I understand, enough is in hand to answer the claim of the petitioner, and will be forthcoming if he chooses to take it. That being so, I must ask, Will he gain anything by this petition?

I apprehend that the law is pretty clear that, where there is no voluntary winding-up a creditor is almost ex debito justitiæ entitled to have a winding-up order if he can shew that he will gain anything by it—at any rate, unless the great body of the other creditors are against it. Now, I have come to the conclusion that this petitioner would gain nothing by it. At any rate, I cannot come to the conclusion that there is any possibility that he will gain anything; and all the other admitted creditors are either against him, or, as is the case with two of them, have themselves accepted the composition of 12*s.* 6*d.* Ought I to reopen the winding-up manifestly contrary to the interest of all the creditors, and make them refund (because that is what a liquidation would come to) the moneys of the society which they have received through the operation of a tribunal not in any way recognised by law? Am I justified in doing that merely because the petitioner, who cannot get anything more, as I think, than what he has been offered, wishes the machinery of the Court to be used to enable him to test the conduct of directors in proceedings in the nature of misfeasance summonses? I think not; and I think that the authorities which were cited and relied upon in *In re Chapel House Colliery Co.* (1) compel me to come to that conclusion. Baggallay L.J., referring to *In re Uruguay Central and Hygueritas Ry. Co. of Monte Video* (2), says: "The head-note of that case gives the rule, to which I assent, and I need not go into the judgment:—'As a general rule an unpaid creditor of a company is entitled to a winding-up order ex debito justitiæ; but that rule is subject to exceptions, *e.g.*, where all the other creditors oppose the petition, and it appears that the

(1) 24 Ch. D. 259, 267. (2) 11 Ch. D. 372.

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petitioning creditor will not be in a better position by obtaining a winding-up order.'" Then Baggallay L.J. says that there may be also other cases in which the Court would dismiss the petition; but that where the circumstances above mentioned exist, he thinks the order ought not to be made. I act on that principle in this case. There are some other considerations which point in the same direction. There has already been a petition for the winding-up of this company. This petitioner must have known of that petition; yet he did not appear in support of it—at least, he gave no notice of his intention to appear in support of it. He waited till that was got rid of; he waited until all those funds had been distributed and everything settled; and now he comes forward with his own petition, I certainly am the more indisposed to help him because he stood by in that way.

Therefore on that ground, and on that ground alone, I should be of opinion that the petition ought to be rejected.

Then comes another question—one of very great difficulty. Mr. Swinfen Eady says, on the authority of *In re Padstow Total Loss and Collision Assurance Association* (1): "Here is an illegal society"—he used the word "illegal," but I do not think that is quite the right word to use—"a society not authorized by law, and therefore not existing, from the point of view of the Companies Acts, as a society at all, and therefore, according to the authority of *In re Padstow Total Loss and Collision Assurance Association* (1), it cannot be wound up." I do not think it is necessary to determine that point, and if my judgment turned entirely on it I should certainly take further time to consider my judgment; but as it does not turn even mainly on that point, and as the case may perhaps go to another Court, it is right that I should express an opinion on that point also. This society was a legal society when it was constituted in 1868. It had complied with whatever formalities were required by the law to be complied with at the time it was constituted, and it only ceased to have the full protection and recognition of the law by reason of the repeal, which took effect in 1896, of the Act under which the society had been constituted, and

(1) 20 Ch. D. 137, 143.

probably in consequence of the fault of the secretary in taking no notice of the requisitions sent to him by the Registrar of Friendly Societies, which would have pointed out to him, and no doubt did point out to him, that he ought to take the proper steps to have his company registered under the Act of 1874. He took no such steps. Thereupon, with regard to the only Act under which his society had the recognition of the law, it lapsed and became a society about the status of which there must be the greatest possible doubt, and I cannot pretend at present to say what that status was. There was, I suppose, property vested in trustees for the society, and the most difficult and complicated questions might arise. What I have to consider is whether, by reason of s. 4 of the Companies Act, 1862, a winding-up order is excluded. That section says that "no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act" for purposes including the purposes of this society "unless it is registered as a company under this Act"—which is not the case—"or is formed in pursuance of some other Act of Parliament." Now, in a literal sense, this society was formed under the provisions of some other Act of Parliament, namely, the Building Societies Act, 1836; but can those words, "formed under the provisions of some other Act," be limited in that way? I am inclined to think that "formed under the provisions of some other Act of Parliament" must mean formed and having its existence recognised by another Act of Parliament. Therefore I think that on all these grounds the petition ought to be dismissed. I have not considered the technical point so carefully as I otherwise should have done, because I have a strong opinion on the other part of the case. The petition must be dismissed with costs.

Terrell, Q.C. With regard to costs, the society pleads its own illegality. It says that it is a society which cannot be recognised at law, and therefore it is submitted that it cannot have costs. It could not sue, it could not issue execution, and it cannot give a receipt for the costs if they are directed to be paid to it.

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[WRIGHT J. What do you say, Mr. Swinfen Eady? It is rather an ingenious point, and for the moment I do not see the answer to it. The society has resisted the petition on the ground that it is a non-existent society for the purposes of winding up. Can you ask for costs?]

Swinfen Eady, Q.C. Yes. The Court required assistance in order that the point might be brought before it. The society is a respondent to the petition, and is served as an existing society; and the petitioner, having failed, is not entitled to say that the society is an illegal one having regard to the fact that he served it, brought it here, and made allegations against it.

[WRIGHT J. If you like to abandon that technical point, I will give the society its costs. I will say "defence by leave withdrawn."]

I am afraid I could not do that.

WRIGHT J. Then I am afraid I cannot give the society its costs if you take up that position. The petition must be dismissed without costs.

Solicitors for petitioner: *Guscotte, Wadham & Bradbury, for Sparkes, Pope & Thomas, Exeter.*

Solicitors for the society and its directors: *Blount, Lynch & Petre, for R. M. Rowe, Ilfracombe.*

Solicitors for creditors: *King, Wigg & Co., for Crosse, Day, & Crosse, South Molton; and Field, Roscoe & Co., for G. Hilton Lewis, Ilfracombe.*

F. E.

In re BANK OF SYRIA.

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OWEN AND ASHWORTH'S CLAIM.
WHITWORTH'S CLAIM.

Company—Directors—Quorum—Breach of Regulations by Directors—Validity of Acts as regards Third Parties.

A company's articles of association provided that its affairs should be conducted by a council of administration; that the number of members of the council should not be less than three; that the continuing council might act notwithstanding any vacancy; and that the council might determine the quorum necessary for the transaction of business. The members of the council became reduced to two, and those two members acting in the name of the company gave securities for debts of the company to persons who had no knowledge of the irregularity. It was not proved that any resolution fixing a quorum had been passed by the council:—

Held, that the securities so given were binding on the company.

One of the securities was transferred by the creditor to whom it was given to one of the two members of the council, who had himself paid off the secured debt:—

Held, that the security was valid in the hands of the transferee.

Decision of Wright J., [1900] 2 Ch. 272, reversed on the first point and affirmed on the second.

In re Scottish Petroleum Co., (1883) 23 Ch. D. 413, followed.

APPEALS against decisions of Wright J. (1)

Messrs. Owen and Ashworth appealed against the rejection of their claim against the company, and the liquidator appealed against the admission of the claim of Whitworth.

The company was registered under the Companies Acts, 1862 to 1890, as a company limited by shares.

Amongst its objects, as stated in the memorandum of association, were "to carry on the business of banking," and "to borrow or raise or secure the payment of money in such other manner as the company shall think fit." The company had no directors—so-called—but was to be managed by a "council of administration." The articles of association contained the following clauses:—

32. "The following persons, viz., Mr. John Robert Pilling,

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Mr. Henry Hargreaves Bolton, Mr. William Ernest Whitworth, and Mr. William Parker, shall form the first council of administration, and the said John Robert Pilling shall be the president of the council. . . ."

34. "The council of administration is invested with full power for conducting the affairs of the company, either by its own body or by delegation, as may be deemed necessary in the interest of the company."

35. "Without prejudice to the general powers conferred by the last preceding clause, and so as not in any way to limit or restrict those powers, and without prejudice to any other powers conferred by these presents, it is hereby expressly declared that the council shall have the following powers" (inter alia) :—

"(*f*) To execute in the name and on behalf of the company, in favour of any member of the council or other person who may incur or be about to incur any personal liability for the benefit of the company, such mortgages of the company's property (present and future) as they think fit. . . ."

38. "The number of members of the council shall not be less than three nor more than nine."

42. "The continuing council may act notwithstanding any vacancy."

53. "The council may meet together for the despatch of business, adjourn or otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A member may at any time summon a meeting of the council."

55. "The council may delegate any of its powers to committees consisting of such member or members of their body as they think fit."

In September, 1894, the members of the council (hereinafter called "the directors") were reduced in number to two only—namely, Pilling and Whitworth. It was agreed between them and John Owen and James Ashworth that Owen and Ashworth should lend the company 4000*l*., and on September 19, 1894,

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they advanced that sum to the company. The cheque for that sum was in fact made payable to Pilling, but the amount was credited to the account of Owen and Ashworth in the books of the company and in the pass-book delivered to them.

By a memorandum in writing under the common seal of the company, and therein stated to be "affixed hereto in the presence of W. E. Whitworth and J. R. Pilling, two members of the council of administration," it was witnessed that Owen and Ashworth had "this 19th day of September, 1894, opened a deposit account with" the company "in the sum of 4000*l.* and upwards," in consideration whereof the company agreed to pay interest thereon at 4*l.* per cent., and to secure the sum of 4000*l.* and upwards they charged and mortgaged 5000*l.* unpaid capital of the company.

In the case of Whitworth the facts were that the company had overdrawn their account with Lloyd's Bank, which held securities given by the company acting by Pilling and Whitworth only. Lloyd's Bank having demanded payment, Whitworth, being still a director, and J. B. Hargreaves, another director, paid off the amount owing and took a transfer of the bank's securities. They had given promissory notes to the bank as a further security for the advance.

An order having been in 1897 made to wind up the company, Owen and Ashworth claimed to prove for the 4000*l.*; but the liquidator rejected their claim on the grounds—(1.) that the alleged debt was incurred by the company at a time when there were only two directors, and that they had no power to charge its uncalled capital; (2.) that the 4000*l.* was not advanced to or for the use of the company; (3.) that the lenders had accepted Pilling as their debtor in lieu of any claim they might have had against the company.

Whitworth also claimed to prove for 881*l.*, the amount which he had paid of the debt to Lloyd's Bank.

It was alleged that the directors had passed a resolution fixing three as the quorum of the directors; but Wright J. held that this resolution was not proved.

Wright J. held that, as regarded outside persons, who were unaware of the defect in the constitution of the council,

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clause 42 enabled the two directors to bind the company. But he held on the evidence that Owen and Ashworth had accepted Pilling as their debtor in lieu of the company, and on this ground of novation he rejected their claim. And he held that Whitworth, though he was a director, stood, as assignee of Lloyd's Bank, in the same position as they did, and that therefore his claim must be admitted.

Jenkins, Q.C., and *Martelli*, for Owen and Ashworth. It is submitted that the learned judge was wrong in holding that there had been a novation. The appellants dealt with Pilling as the president of the council of administration, that is, with the directors of the company under clause 32 of the articles of association, and therefore as representing the company.

[They were stopped by the Court.]

Herbert Reed, Q.C., and *Percy F. Wheeler*, for the liquidator. Though any ordinary business of a company may be transacted by less than the quorum of directors, that is not so when the business, such as that in the present case, is not ordinary business: *Kirk* v. *Bell* (1); *Bottomley's Case.* (2) In *In re Scottish Petroleum Co.* (3), which was relied on by the claimants in the Court below, a quorum of two directors was sufficient under the articles, and two acted. If the continuing directors are less than a quorum, they cannot act: Buckley on the Companies Acts, 7th ed. p. 542. It is submitted that Wright J. was wrong in saying, on the authority of *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4), that outsiders dealing with the company were not bound to inquire into the affairs or position of the company; that was a different case, for there the fixing of the quorum was merely a matter of "internal regulation," which could not be known to outsiders. (5) It was expressly laid down by the House of Lords in *Mahony* v. *East Holyford Mining Co.* (6) that persons dealing with joint stock companies are bound to take notice of the "external position" of the company as regulated by its memo-

(1) (1851) 16 Q. B. 290.
(2) (1880) 16 Ch. D. 681.
(3) 23 Ch. D. 413, 431.
(4) [1895] 1 Ch. 629.
(5) Ibid. 633.
(6) (1875) L. R. 7 H. L. 869, 893.

randum and articles, to which every one may have access. So here, the outside world must be taken to have had notice of clause 38 fixing the number of members of the council at not less than three, and therefore any person dealing with the directors was bound to inquire whether there were three directors who had power to bind the company. In *York Tramways Co.* v. *Willows* (1), although, in the circumstances, an allotment of shares by two directors, three being a quorum, was held valid, Manisty J. carefully guarded himself (2) against any inference that as a general rule the business of a company could be carried on by less than the required quorum.

With regard to the claim of Whitworth, he was a director, and as such he necessarily had notice of the irregularity in the transaction with Lloyd's Bank; he cannot therefore, though he took by assignment from them, obtain any better title than he would have had if the advance had been originally made by himself. He was acting in a fiduciary character when the securities for the overdraft were given on behalf of the company to Lloyd's Bank. In *Bovey* v. *Smith* (3), "a trustee having sold land to a stranger, that had no notice of the trust, and a fine with proclamations and five years past, the trustee afterwards, for valuable consideration really paid, purchases these lands again of the vendee." And it was held that the trustee "should stand seized in trust as at first, as if the land had never been sold, nor any fine levied." The authority of that case was recognised by Lord Redesdale in *Kennedy* v. *Daly*. (4)

Jenkins, Q.C., and *Martelli* were not heard upon the liquidator's appeal, and were not called on to reply on the appeal of Owen and Ashworth.

LORD ALVERSTONE C.J., after stating the facts, continued :— It is impossible to come to any other conclusion than that the company were debtors to Messrs. Owen and Ashworth in respect of the 4000*l.* advanced by them, subject to the question of subsequent novation.

(1) (1882) 8 Q. B. D. 685.
(2) 8 Q. B. D. 690.
(3) (1682) 1 Vern. 60.
(4) (1804) 1 Sch. & Lef. 355, 379.

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On September 19, 1894, Whitworth and Pilling, the then two directors of the company, gave to Owen and Ashworth a receipt for 4000*l.* and a charge upon 5000*l.* unpaid capital of the company. The seal of the company was affixed in the presence of the two directors, and it seems to me clear that that document was binding on the company so far as the innocent creditors were concerned. [His Lordship referred to the above-stated provisions of the memorandum of association, and to clauses 34, 38, and 42 of the articles, and continued :—]

It is said that in addition to this a resolution was passed by the directors in the year 1893 that the quorum should consist of three members. Speaking for myself, I do not think this makes any difference; but I gather that Wright J. did not think the evidence with regard to that resolution at all satisfactory, and it certainly appears (whether that resolution was passed or not) that for several years the business of the company was conducted by two directors without regard to any such resolution. But, as I have already said, that seems to me not to be a really important matter. In my opinion, this part of the case is covered by the decision of the Court of Appeal in *In re Scottish Petroleum Co.* (1), in which case the articles were quite as stringent as they are in the present case, there being also a clause (83) providing that the continuing directors might act, notwithstanding any vacancy in the board. There Baggallay L.J. said (2): "It is contended, and perhaps rightly, on behalf of Mr. Wallace that two of these four directors had ceased to be directors before the allotment was made, and it is also contended that though by the articles two directors form a quorum when the board is duly constituted, there could not be a quorum capable of transacting business when the board of directors was not filled up to the minimum number. I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number. Still I think that, having regard to art. 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, but I see no reason for adopting that view. The number of directors never

(1) 23 Ch. D. 413. (2) 23 Ch. D. 431.

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exceeded four, and there might be a vacancy, in which case, according to the terms of art. 83, the continuing directors could act." I think also that the other authorities, to which Wright J. referred in his judgment as shewing that such an objection to the regularity of the proceedings would not affect third parties, truly represent the law, and that if the defect in the number of directors were the only objection there could be no doubt as to the claim being valid. But it is said that by an arrangement made in 1895 Owen and Ashworth agreed to accept Pilling as their debtor and to discharge the company. That point was decided in favour of the liquidator by Wright J. I cannot help thinking that the learned judge did not quite keep in mind all the circumstances of the transaction. [His Lordship referred to the circumstances relied upon as a novation, and continued:—]

It seems to me impossible to come to the conclusion that at the commencement of the liquidation there was in existence such an arrangement or agreement between the three parties as would discharge the company. In my opinion, the appeal should be allowed and the claim admitted.

With regard to the liquidator's appeal, the company had borrowed money from Lloyd's Banking Company, and had given them a security which is open to the same objections, namely, either that it had been sealed by only two directors, or, at any rate, that there was not in existence a sufficient number of directors of the company when the security was given. I have already expressed my opinion that this objection could not be set up as against Lloyd's Bank. I am also of opinion that Whitworth, when he paid off Lloyd's Bank and took up the security, was entitled to stand in their shoes. Mr. Wheeler has contended that he was in the position of a trustee, and has urged that a trustee who has sold the trust property to a person who may have had a good title to it, and has subsequently repurchased it and has got it back into his own possession, will not be allowed to hold it as his own free from the trust, because he is still a trustee. Without in any way questioning that doctrine, which seems to me to be sound and good sense, it has not, in my opinion, any application to

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the present case. Whitworth was not a trustee in that sense of the word. If he had not been in a position to assert the rights which he acquired from Lloyd's Bank, it is possible that there might be more difficulty in his establishing a right against the company. But I can see no reason why he should not have the same right of proof against the company, who have had the money, as his assignors, whose debt he has paid in pursuance of an obligation to pay by reason of his having given a promissory note to the bank.

In my opinion, therefore, the appeal of Messrs. Owen and Ashworth should be allowed, and that of the liquidator should be dismissed.

RIGBY L.J. I agree, and for the same reasons.

VAUGHAN WILLIAMS L.J. I also agree.

Solicitors: *R. H. Bentley; Carlisle, Unna, Rider & Heaton.*

W. L. C.

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BRITISH MOTOR SYNDICATE, LIMITED *v.* TAYLOR & SON.

[1897 B. 4949.]

Patent—Infringement—Patented Articles bought in England and sent Abroad for Sale—Innocent Purchaser—Transport of Patented Articles—Exposing for Sale—"Using and vending" the Invention—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *Sched. I., Form D—Damages, Measure of.*

A person who has in his possession, for the purpose of sale, an article which is an infringement of a patent thereby renders himself liable for infringement, however innocently he may have acquired the article—as, for instance, by an innocent purchase from an infringing manufacturer—and notwithstanding that he may not have actually exposed it for sale.

Exposing a patented article for sale is a "using and vending" of the invention.

Minter v. *Williams,* (1835) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135, considered.

Whether mere possession of a patented article, without any intention of selling it or using it in trade, by a person other than the patentee in itself constitutes a "user" of the patent, *quære.*

The defendants were innocent purchasers in England, from an infringing

manufacturer, of twenty-seven articles protected by letters patent for the United Kingdom only, in the Form D, in Sched. I. to the Patents, Designs, and Trade Marks Act, 1883, conferring upon the patentee the sole privilege to "make, use, exercise and vend" the invention. Eight of these articles they sold in England, and the remaining nineteen they sent to their branch business house in Paris, where they were sold to various foreign purchasers:—

Held, that as, upon the evidence, the defendants had purchased the whole twenty-seven for the purpose of sale, that was a "user" of the invention constituting an infringement in respect of the nineteen sent abroad as well as of the eight sold in England, and that the plaintiffs were entitled to damages (in addition to an injunction, to which the defendants had already submitted) in respect of the whole twenty-seven.

The measure to be applied in assessing damages for infringement of a patent is the pecuniary loss actually sustained by the patentee through the infringement, and no more.

The principle of assessment stated in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, (1899) 16 Rep. Pat. Cas. 209, approved of. *Penn* v. *Jack*, (1867) L. R. 5 Eq. 81, 87, considered.

Whether mere transport from place to place of a patented article is an infringement, *quære*. *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*, [1898] A. C. 200, 208, considered.

APPEAL by the defendants from the decision of Stirling J. (1) The word "royalty" should be substituted for "trade price" in line 7 on page 578 of the report below.

Bousfield, Q.C., *Hume-Williams, Q.C.*, and *J. M. Lainé*, for the defendants. First, as to the question of damages, we submit that Stirling J. has proceeded on a wrong principle in assessing them at 5*l.* for each of the infringing articles. He should not have assessed them at more than 3*l.* each at the most, that being the highest royalty which, according to the evidence, the plaintiffs could have got from any licensee. The damage in a case of infringement is the damage actually sustained by the patentee, that is, the sum actually lost through the infringement; the amount of profit made, or that might have been made, by the infringer is immaterial, for, however large his gains, he is only liable in nominal damages so long as the illegal sales do not injure the trade of the patentee: *United Horse-Shoe and Nail Co.* v. *Stewart*. (2) Secondly, the learned judge has proceeded on the assumption that transport of the patented articles

(1) [1900] 1 Ch. 577. (2) (1888) 13 App. Cas. 401, 408, 413.

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through this country with a view to user in a foreign country constitutes an infringement. But that is contrary to the ratio decidendi of *Neilson* v. *Betts* (1) and *British Dynamite Co.* v. *Krebs* (2), in both of which cases the ground of the decision was that the invention was being used in the very act of transport. The mere possession of the patented article is not in itself an infringement. No doubt, in *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (3), there was mere possession, and yet an injunction was granted, but that was because, as the defendants had no intention to use the infringing articles, an injunction could do them no harm. If the defendant does not threaten and intend to infringe, it is not the general practice to grant an injunction: *Frearson* v. *Loe.* (4) In the present case no user of the patented articles was involved in the transport of them to France, and that is the distinction between this case and *Neilson* v. *Betts* (1) and *British Dynamite Co.* v. *Krebs.* (2) The question, then, is whether mere transport from place to place is necessarily a "user" of the patented article. There is no actual decision upon this point, but it was raised in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (5), where, however, Lord Herschell stated that he reserved his opinion upon it. Our submission is that the facts of this case do not amount to a "user" of the invention at all. With regard to the nineteen articles, we never "used" them; we simply transported them abroad, and that is the only ground of infringement alleged.

[LORD ALVERSTONE C.J. Of the twenty-seven articles, you sold eight in this country, but, in consequence of that being said to be an infringement, you sent the remaining nineteen abroad. The inference seems to be that you did so because you could not sell them here.]

There is no evidence that we sent them abroad to evade the order made against Messrs. Richter & Green, who sold them to us: the only evidence is that we simply transported them

(1) (1871) L. R. 5 H. L. 1.
(2) H. L., April 7, 1879.
(3) (1884) 26 Ch. D. 766.
(4) (1878) 9 Ch. D. 48, 66.
(5) [1898] A. C. 200, 207–8.

abroad. The plaintiffs have not protected themselves outside the United Kingdom, and therefore we could, had we chosen to do so, have manufactured abroad and sold abroad.

[VAUGHAN WILLIAMS L.J. But you exposed the nineteen articles for sale.]

There is no evidence of our having done so in this country, where alone they are protected by the patent; but, even if that were so, mere exposure for sale, without any actual sale, is not a "using" or "vending" of the invention: *Minter* v. *Williams*. (1) The words of the patent, "make, use, exercise and vend," must be read in a limited sense. It is the employment of the patented article for the purposes for which it was designed that constitutes its active use: *Betts* v. *Neilson* (2); *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (3); *Holmes* v. *London and North Western Ry. Co.* (4); *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (5)

Moulton, Q.C., and *A. J. Walter*, for the plaintiffs. The purchase for the purpose of resale was itself an infringement; and here we have not only a resale of some of the articles in England, but the export abroad of the remainder for sale and the receipt in this country of the proceeds of the articles sold abroad. Export is as much an infringement as import.

[LORD ALVERSTONE C.J. How do you get over *Minter* v. *Williams*? (1)]

It is merely a decision on pleading—that is, on a general demurrer by the defendant to the count of the declaration alleging that the defendant had exposed to sale the patented article in breach of the patent, which granted the right to "make, use, exercise and vend" the invention. The judges were dealing with a novel mode of pleading, not with the question of law.

[LORD ALVERSTONE C.J. I doubt whether the decision is consistent with the observation subsequently made by Byles J. in *Oxley* v. *Holden*. (6)]

(1) 4 Ad. & E. 251, 255–6; 1 Web. Pat. Cas. 135, 138.
(2) (1868) L. R. 3 Ch. 429.
(3) (1881) 17 Ch. D. 721, 733, 741.
(4) (1852) Macr. Pat. Cas. 4, 22.
(5) (1882) 8 App. Cas. 5, 13.
(6) (1860) 8 C. B. (N.S.) 666, 704.

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Having the patented article ready to supply for sale is a "user."

Then, as to the question of damages, it is said that the wrong-doer has no right to more damages than the lowest royalty obtainable. But the royalty charged may vary according to the more or less onerous covenants entered into by the licensee. The true criterion of damages is, what has a person who comes to the patentee with a proposal to use his invention to pay for that privilege? We submit that the learned judge was right in not making any distinction between the eight starters sold in this country and the nineteen sent abroad.

Hume-Williams, *Q.C.*, in reply. There is no evidence as to when the nineteen starters were sent out of this country. As the plaintiffs are coming for damages, it is for them to prove that they were sent abroad since action; for if they were sent before, there was no infringement. It is a fallacy to say that there has been any exposure for sale of the nineteen; there is no evidence of that. Mere possession of the patented article has never been held an infringement. The strictest interpretation should be given to the patent on which the plaintiffs are suing, especially upon the words "make, use, exercise and vend." *Oxley* v. *Holden* (1) strengthens our case, for in the course of the argument (2) *Minter* v. *Williams* (3) was cited, whereupon Erle C.J. observed, "An innocent importer has been held not liable."

[VAUGHAN WILLIAMS L.J. referred, on the measure of damages, to *Penn* v. *Jack.* (4)]

LORD ALVERSTONE C.J. I am of opinion that, upon the materials before us, we cannot reverse the finding of Stirling J. upon either point.

The material facts are as follows. The plaintiffs, who are owners of the patent, had, prior to this action, brought an action against Messrs. Richter & Green for infringement, and had obtained judgment for damages against them, but those

(1) 8 C. B. (N.S.) 666.
(2) Ibid. 704.
(3) 4 Ad. & E. 251; 1 Web. Pat Cas. 135.
(4) L. R. 5 Eq. 81.

damages had not been paid. They then took the present proceedings against the defendants, who are innocent in this sense, that they were ignorant of the plaintiffs' patent rights, and were purchasers of infringing articles from Messrs. Richter & Green, though I need scarcely say that ignorance is no defence at law. The defendants purchased twenty-seven machines from Messrs. Richter & Green at some time before the action; they sold eight of the twenty-seven in the market, and they sent abroad at some time, but we are not told when, the remaining nineteen. I think, if it was intended to draw any distinction with regard to the measure of damages, apart from the question of infringement, between those nineteen and the eight, the facts purporting to create the distinction ought to have been brought before the Court. It has been candidly stated by Mr. Hume-Williams, who, with Mr. Bousfield, has argued this case with great ability, that no distinction is sought to be drawn, with regard to the measure of damages, between the articles sold in England and those sold abroad. We have been pressed to say that we ought to act on the view that these nineteen articles were sent abroad in the ordinary course of business long before any complaint was made by the plaintiffs against the defendants. I do not think we ought to draw any conclusion from this for the purpose of interfering with Stirling J.'s judgment—the point not having been raised before him. That the learned judge did not come to the conclusion that the defendants had parted with the articles before any proceedings were taken is clear from his judgment, for he says (1): "What the defendants did was to carry these articles out of the United Kingdom with a view to selling them—that is, with the object of turning them to profitable account. By so doing the defendants attained two objects: first, they prevented the operation of the order contained in the judgment for the delivery up and destruction of the infringing articles; and, secondly, they actually obtained the benefit of the proceeds of sale."

On these facts two important questions arise: first, whether there was any evidence of infringement with regard to the

(1) [1900] 1 Ch. 582.

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nineteen articles; and, secondly, what was the measure of damages in respect of either the whole twenty-seven or part of them.

First, with regard to infringement, I am clearly of opinion there was evidence of infringement here with respect to the whole twenty-seven. The fact being established that the defendants bought them with a view of realizing them, and did sell eight of them in this country, I come to the conclusion that they bought the whole twenty-seven for the purposes of sale here if opportunity arose; and I consider that there is no decision, certainly no principle, upon which we ought to hold that the fact that they disposed by sale of nineteen of the twenty-seven they had bought to customers abroad through their agents there, enables us to say there is no infringement with regard to the nineteen. The patent says that the patentee has the sole right during the fourteen years to "make, use, exercise and vend the said invention"; and it further provides that the patentee "may have and enjoy the sole use and exercise and the full benefit of the said invention"; and all Her Majesty's subjects are commanded that they do not during the fourteen years "either directly or indirectly make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same."

Now, it is said that the case of *Minter* v. *Williams* (1) has decided that exposure for sale is not in itself infringement. I will deal with *Minter* v. *Williams* (1) as an authority in a moment, but I desire to say that I am satisfied that *Minter* v. *Williams* (1) has never been considered to be an authority for such a proposition. I think, moreover, it is quite plain, when that case is considered, that the learned judges who decided it did not mean to lay down any such proposition. Not only was it a pure pleading point, but, in addition, the judgment of Coleridge J. points out that it did not appear, from the pleadings as they stood, that the exposure for sale was necessarily injurious to the patentee. "It may, on the contrary," he says in his judgment (2), "be very beneficial; it

(1) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135.

(2) 4 Ad. & E. 256; 1 Web. Pat. Cas. 138.

is not, therefore, necessarily the vending, which is exclusively granted to him." Those who are acquainted with the old systems of pleading will remember that on demurrer any state of facts could be assumed, consistent with the allegations in the pleadings. You might put any construction on the allegations that the pleadings could bear. To my mind that decision was solely a decision against the plaintiffs' departing from the well-known form of count which had charged as a breach the making, using, exercising or vending, in the words of the patent, and adding a fourth count, using the words only "exposure for sale"; and certainly it was never intended to lay down any rule of law that exposure for sale might not be an infringement. When that case was cited in *Oxley* v. *Holden* (1) as an authority that exposing for sale was not an infringement, Byles J., before whom *Oxley* v. *Holden* (1) had been tried, said: "The jury found that they (the patented articles) were manufactured for sale, and that the defendant endeavoured to sell them; and I told them, that, that being so, there had been a user of the patent." Now, it is said by Mr. Hume-Williams, "That is true, but in *Oxley* v. *Holden* (1) the defendant had manufactured." In my opinion, on principle, that can make no difference. Where a person buys a manufactured article which has been manufactured by an infringer, gets possession of that article, and is thereby enabled to use it for one of the purposes for which it was intended that the patentee alone should use it during the fourteen years, I am quite satisfied that it makes no difference whether that person has manufactured it himself, or whether he has purchased it from some person as a ready-made article. I think the practice for years has been in accordance with this view. Any other view would be inconsistent with *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (2), because there could be no injunction unless there was an infringement. In *United Telephone Co.* v. *Sharples* (3), before Kay J., a judge of great experience in these matters, the whole point argued was as to whether the possession for

(1) 8 C. B. (N.S.) 666, 704. (2) 26 Ch. D. 766, 774.
(3) (1885) 29 Ch. D. 164.

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experimental purposes of articles imported from abroad was an infringement of letters patent, and he held it was. I perhaps may be permitted to say that in all my experience I have never heard this point suggested, nor have I ever heard *Minter* v. *Williams* (1) cited as an authority for such a proposition; and I am quite satisfied that there must have been scores of cases in which the point could have been raised if that case had been regarded as an authority for such a contention. I should not hesitate to overrule *Minter* v. *Williams* (1) if it were supposed to bear the construction which has been attempted to be put upon it. As I have said, I do not think that, when that case is properly considered, it was intended to decide anything of the kind.

I therefore hold that there was clear evidence of infringement in this case with regard to the whole of the twenty-seven articles. I expressly abstain from saying anything with regard to the point which was reserved by Lord Herschell in the *Badische Case* (2), because, in my opinion, the question whether there is infringement by transporting from place to place depends entirely upon the value of the invention protected by the letters patent, and the manner in which the invention has been used; and, speaking for myself, I should wish to reserve consideration of that point. There may be transportation which would be no infringement: there may be transportation, as in *Neilson* v. *Betts* (3), which undoubtedly would involve infringement.

I now come to what is, to my mind, the more difficult question, whether the learned judge was right in assessing the sum of 5*l.* each in respect of the whole of these articles. I do not think it is open to the defendants in this Court to raise the question that, because judgment has been recovered against Messrs. Richter & Green in respect of these twenty-seven articles, therefore they ought not to pay damages. I think that might be a most substantial defence under certain circumstances, as was pointed out in fact by Wood V.-C. in *Penn* v. *Jack*. (4) If it had turned out that the plaintiff

(1) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135.
(2) [1898] A. C. 208.
(3) L. R. 5 H. L. 1.
(4) (1866) L. R. 3 Eq. 308.

had received what was equivalent to a royalty upon those twenty-seven, I think very different questions might have arisen. That point, however, is not before us. For the same reason I do not think it is open to the defendants to raise an objection that these nineteen were sent abroad before action, and that, therefore, they do not constitute an infringement. In my judgment, when once it is found that the purchase and possession with the view of sale are sufficient, as I think they are, to constitute infringement as amounting to user of the invention within the meaning of the patent, then the defendants are not in a position to raise the other question with regard to quantum.

Upon the question whether Stirling J. was right in assessing the sum of 5*l.* for each of the twenty-seven articles, I desire to say that I do not wish to be thought as supporting the view which was indicated as a possibility, though not put forward as a principle, by Wood V.-C. in *Penn* v. *Jack* (1) that persons may be punished, because they are infringers, beyond the amount of damages which the plaintiff has really sustained. I do not think that principle was ever acted upon, and I do not think it would be good law so to hold, if it were ever attempted to be set up. I adopt entirely the language of the late Lord Chief Justice and of Collins L.J. in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.* (2) which was cited in the judgment of Stirling J. The Lord Chief Justice said: "The measure of damage may in such cases be the cost of the licence. It may be; but I think, upon an examination of all these cases, it will be found that underlying the measure of damage there is the assumption that, if it had not been that the particular defendant manufactured the particular things, then that those particular things would have been manufactured by the plaintiff or his licensees." And Collins L.J. said: "The plaintiffs have to shew, therefore, that they have sustained pecuniary loss, and, as far as the nature of the case may permit, the amount of that loss." I take the same view of the facts that Stirling J. has adopted. From the evidence it appears that, although to manufacturers who guaranteed to construct a

(1) L. R. 5 Eq. 81, 87. (2) 16 Rep. Pat. Cas. 209, 212, 216.

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minimum quantity the plaintiffs charged a royalty of 3*l.*, in other cases they used to get larger amounts varying according to the size of the engine and the extent to which persons who paid the royalty were going to use the patented apparatus. The defendants are not persons in the position of a manufacturer coming to take a licence upon those terms. Whether they are in the position of persons who would have had to pay the larger amount we do not know; but the amount is a matter entirely for the learned judge; there are no materials before us upon which we can properly come to the conclusion that he was wrong in assessing the figure at 5*l.* He has, in my opinion, adopted the true view in assessing the damages at the amount which the defendants would have had to pay for the permission to do that which they wrongfully did, which is the principle he lays down in his judgment (1) as indicating what should be the measure of damages. For these reasons—and I desire that it should not be thought that we are deciding anything more than we have actually decided—I am of opinion that this appeal should be dismissed.

RIGBY L.J. I am of the same opinion, and for the same reasons. All I wish to say is that the case of *United Horse-Shoe and Nail Co.* v. *Stewart* (2) was cited as though the House of Lords had given colour at any rate to the view, even if they had not decided it, that only articles actually sold were to be considered for the purpose of assessing damages. The House of Lords did not and could not entertain that question, for the pursuers could not and did not open it. They only sued in respect of the articles actually sold; and therefore in the House of Lords it would have been quite impossible for any one to suggest that they ought to be paid damages in respect of the articles not sold.

VAUGHAN WILLIAMS L.J. I agree. First, I will say a word or two with regard to *Minter* v. *Williams*. (3) I think myself that *Minter* v. *Williams* (3) was wrongly decided, and

(1) [1900] 1 Ch. 585. (2) 13 App. Cas. 401.
(3) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135.

we are not bound by it here. We have a right, and it is our duty, if we think *Minter* v. *Williams* (1) was wrong, not to follow it; but speaking for myself, I have no doubt whatever that the Court of Queen's Bench did decide, and intended to decide the very point for which it has been used as an authority in the present case. The declaration in *Minter* v. *Williams* (1) employed all the words, "use, exercise, and vend"; and the alleged breach having been an "exposing to sale," counsel for the plaintiff first argued that "exposing to sale" came within the term "vend," and then that, if it did not, it came within the term "use." That was the argument. To my mind both Patteson J. and Coleridge J. intended to say that the exposing to sale came neither within "vending" nor "using"; but I quite agree with the other members of the Court that that was not a satisfactory conclusion.

Now, speaking for myself, I am not satisfied that mere possession of every patented article does constitute a "user" within the meaning of the language of the letters patent. Whether possession constitutes a user must depend upon the nature of the article: it may amount to a user, and it may not: here it is said that it did not amount to a user. But there was acquisition and possession of these articles for trade purposes with the intention of using them in trade; and in my judgment such an acquisition and such a possession of an article, whatever its nature may be, is a user. I agree therefore with Stirling J. that there was a clear user in this case.

With regard to the question as to whether any advantage can be taken by the defendants of the fact that a judgment has been obtained against the manufacturers who did the original wrong, and as to whether people who have bought from those manufacturers are to be treated as buying from licensees I wish to say nothing, because the question has not been raised here. But there still remains the question what is the measure of damages in the case of a user of the kind that we have here, that is to say, a user for trade purposes, as is evidenced by the admitted fact that the defendants did sell these articles—some, it is true, out of this country—which

(1) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135.

C. A. 1900 BRITISH MOTOR SYNDICATE, LIMITED v. TAYLOR & SON. Vaughan Williams L.J.

they had possessed in this country. Are we in such a case to assume that the measure of damages is necessarily the amount that the plaintiffs, the patent owners, ordinarily charged for a licence to vend or use their invention? I do not myself agree with the proposition that that is necessarily the measure of damages. It may be so if there is a sale within the area covered by the patent; but whether or not it is the proper measure of damages in every case of an infringement by user is a question that I should, if I had to decide it, like to consider further, because I have no doubt myself that whatever the measure applied is, what has to be measured is the actual damage sustained by the plaintiffs whose patent has been infringed.

But I do not think it is open to us to consider this matter, because at the time of the trial all the twenty-seven articles which were purchased by the defendants from the manufacturers, who were the infringers, were dealt with upon the same basis. No distinction was made or drawn before Stirling J. between these articles which had been sold in this country and those which had been sold abroad.

In my judgment, if you find a user of the nature which has been proved here, coupled with a sale in England, the measure of damages as applied by Stirling J. is the right one; that is to say, the measure of the ordinary charge by the patentees for a licence for a vending or using.

In regard to what the Lord Chief Justice has said about the amount, 5*l.*, I entirely agree that we cannot go into that question. It is a question eminently for the learned judge who tried the case.

Solicitors: *Everett & Hodgkinson; Norris, Allens & Chapman.*

G. I. F. C.

LONDON GENERAL OMNIBUS COMPANY, LIMITED *v.* LAVELL.

C. A. 1900 Nov. 19.

[1899 L. 1356.]

Practice—Action of Deceit—Get-up—Passing off—Evidence—Probability of Deception—Inspection—View by Judge—Rules of Supreme Court, 1883, *Order* L., *r.* 4.

In an action for deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the judge, on a view by him of the two articles—such as two rival omnibuses—under the Rules of the Supreme Court, 1883, Order L., r. 4, that the defendant's article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.

North Cheshire and Manchester Brewery Co. v. *Manchester Brewery Co.*, [1899] A. C. 83, considered.

THIS was an action for an injunction to restrain the defendant, an omnibus proprietor, from running any omnibus painted and lettered in such a manner as to form a colourable imitation of the painting and lettering of the plaintiffs' omnibuses; and for damages. In their statement of claim the plaintiffs alleged that the get-up of the defendant's omnibuses represented and led to the belief that they were the plaintiffs'.

At the trial before Farwell J., upon the plaintiffs' counsel opening the case, the learned judge proposed that he should view two rival omnibuses of the plaintiffs and the defendant that were standing in the courtyard of the Royal Courts of Justice. Thereupon, with the consent of the parties, his Lordship viewed the two omnibuses, and on returning into Court stated that he was satisfied upon the evidence of his own eyesight alone, without any further evidence, that the defendant's omnibus was so painted and lettered on the side-panels as to be calculated to deceive the casual passenger. Relying upon his Lordship's conclusion of fact, the plaintiffs' counsel called as their only witnesses the plaintiffs' panel-painter or writer and their secretary to prove that there was a reasonable

C. A. 1900 LONDON GENERAL OMNIBUS COMPANY, LIMITED v. LAVELL.

probability of deception, and offered no evidence of actual deception. The defendant then called witnesses to rebut the plaintiffs' case, and in the result the learned judge gave judgment finding that there was, on the side-panels of the defendant's omnibuses, "the most undoubted imitation that would deceive the ordinary traveller"; that the defendant had "intentionally designed" the resemblance with a view to getting hold of passengers intending to use the plaintiffs' omnibuses; and that the casual passenger, though not the expert, would very probably be deceived into thinking that the defendant's omnibuses were the plaintiffs'. Accordingly his Lordship granted a perpetual injunction, with costs.

The defendant appealed.

The appeal was heard on November 19, 1900.

Facsimiles of the side-panels of the rival omnibuses were produced on the appeal, but the only question calling for a report was whether, the action being an action for deceit, the injunction could be supported in the absence of any evidence of actual deception, or at least of probability of deception.

Bramwell Davis, Q.C., and *J. H. Boome*, for the defendant.

Hughes, Q.C., and *T. L. Wilkinson*, for the plaintiffs.

[LORD ALVERSTONE C.J. What right has the General Omnibus Company, any more than others of Her Majesty's subjects, to bring an action for deceit without evidence of deceit?]

Such an action may be brought without any evidence of actual deception. It is sufficient to shew that what the defendant is doing is "calculated to deceive." Order L., r. 4, of the Rules of the Supreme Court, 1883, provides that "it shall be lawful for any judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein." Under that rule the learned judge viewed the rival omnibuses and came to the conclusion, upon the evidence of his own eyesight, that the get-up of the defendant's omnibus was calculated to deceive. The practice is, where a jury has

had a view, not to call evidence to shew what the facts are, the jury being able to see them for themselves.

[LORD ALVERSTONE C.J. I have never heard it suggested before that the plaintiff in an action for deceit could rely upon a view alone for proving his case.]

Here the learned judge, having had the view, decided upon it, and held that it was not necessary for us to go into evidence, though we were prepared to do so. In *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1), it was held by the House of Lords that the name of the defendant company, the appellants, was in itself so obviously similar to that of the plaintiffs, that it was calculated to deceive, and evidence of actual deception was not required, either by their Lordships or by the Court of Appeal. (2)

[LORD ALVERSTONE C.J. But it appears there was in that case evidence that persons had been misled by the similarity of name. (3)

VAUGHAN WILLIAMS L.J. And on the defendants' appeal to the House of Lords, the Lord Chancellor said (4) that there was "a considerable body of evidence" to that effect.]

But his Lordship goes on to say that, for his own part, he should not have required such evidence.

[VAUGHAN WILLIAMS L.J. That statement of the Lord Chancellor was obiter. There is a difference between the case of similarity of name—which was that case—where the similarity is obvious to the ear, and such a case as the present, where you have to look at the supposed indicia with the eye.]

But the appeal to the eye is quite as strong as to the ear. In *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (5), which was a case of similarity of design, Lord Herschell considered that the eye must be the judge in such a case, by comparing the two designs when placed side by side. Now, here the defendant's evident intention is to imitate our omnibus as closely as possible. It is not the regular passenger who is deceived, but the casual passenger, and it is impossible to find him. There

(1) [1899] A. C. 83, 84, 85.
(2) [1898] 1 Ch. 539, 548.
(3) [1898] 1 Ch. 540.
(4) [1899] A. C. 85.
(5) (1889) 14 App. Cas. 550, 555–6.

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is a similarity of get-up, such as Chitty J. restrained in *London General Omnibus Co.* v. *Felton* (1) The learned judge has found in his judgment, and as the result of his view, that there is "the most undoubted imitation." We, therefore, ask your Lordships to apply the rule with regard to the infringement of trade-marks, namely, that the Court will interfere where it is satisfied that there is a "reasonable probability of deception": Sebastian on Trade Marks, 4th ed. p. 128.

[VAUGHAN WILLIAMS L.J. referred to *Mitchell* v. *Henry* (2) as to relying upon evidence of eyesight alone in cases of passing off.]

LORD ALVERSTONE C.J. In my opinion, the judgment of the Court below cannot stand. It seems to me to have proceeded upon the theory (the deceit being founded upon the suggestion that the defendant had run an omnibus which is likely to divert passengers from the plaintiffs' omnibuses) that the plaintiffs are entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned judge viewing the defendant's omnibus and the plaintiffs', and comparing them together. In my opinion, that is not sufficient to justify the plaintiffs in obtaining either an injunction or damages. We have no evidence before us as to what is the custom, or practice, or habits of persons who are riders in these omnibuses, nor as to what has grown up to be regarded as the leading features of omnibuses on any particular route; but we are asked to say that the learned judge was right in coming to the conclusion that, because he thought the two omnibuses so resembled one another that they might be mistaken the one for the other, that is sufficient evidence to support an injunction in an action for deceit. In the first place, it appears to me that if such a view were to prevail, a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the judge of the subject-matter of the action, or anything relating to the subject-matter of an action. It is quite true that by rule 4 of Order L. it is provided that the judge may "inspect any property or thing

(1) (1896) 12 Times L. R. 213. (2) (1880) 15 Ch. D. 181, 195–6.

concerning which any question may arise" in the action; but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea, that the judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence. Of course, it is quite possible there may be cases in which all the circumstances connected with the matter in dispute are of such common knowledge, and are so well known to the tribunal that it may be said no evidence is necessary; as for instance, the common case of the make-up of an article which is intended to be sold in shops, though in that case I think that if the judge, in consequence of there being differences between the two articles, could not say they were identical, he ought not to grant an injunction without evidence before him that the article in dispute was so made as to be calculated to deceive people. Of course I need scarcely say it is not necessary to shew actual deception, because a thing may be calculated to deceive, and a plaintiff may be justified in coming and stopping the practice before the actual deception has taken place.

This case seems to me a case of all others in which evidence should be given of the character which I have indicated. Here, we have two omnibuses running side by side, and competing for the custom of the road, but the two are not identical. If the London General Omnibus Company found their action upon the ground that the alleged infringing omnibus is calculated to deceive, some evidence ought to have been given to justify the learned judge in coming to the conclusion he did, beyond the mere view.

It is said that in *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1) the Lord Chancellor observed that he himself should not have required any evidence in that case, and he perhaps, in one respect, went further, for in an earlier part of his judgment he said that the particular question whether the resemblance in name was likely to deceive could not have been put to witnesses, because it was the very question

(1) [1899] A. C. 83.

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which the judge had to decide. But I am satisfied, myself, that the Lord Chancellor did not mean to lay down any general rule that no evidence that a particular thing was calculated to deceive was ever to be required. In that case evidence had been given, and it was merely a case of the comparison of two names, which may be said to speak for themselves. In the present case, the Court has to make itself acquainted with, or to make an assumption as to what are, the habits of people travelling in omnibuses, and the matters which it may be important to them to observe; and in my opinion it is quite impossible to arrive at a correct conclusion by simply looking at the two omnibuses, without any evidence at all to lead the Court to the conclusion that passengers would be misled by this or that alteration or resemblance.

I do not, of course, express any opinion as to what might have been the proper conclusion, if the evidence had been before the learned judge. At present the evidence for the plaintiffs was in my opinion wholly insufficient, and upon the evidence as it stood the action ought to have been dismissed. The appeal must therefore be allowed.

Rigby L.J. I entirely agree, and certainly I should not have been disposed to add a word, but for the fact that we are reversing the finding of the learned judge. Of course, if that is a finding of a matter of fact, we must take great care to see that there is sound ground for our differing from him. I think that is to be found in the fact that he had no evidence before him that persons had actually been deceived; and I think myself that the difference between the two omnibuses are palpable and important.

As to the observations of the Lord Chief Justice in reference to the view by the learned judge below, I entirely agree in those observations. We have no direct evidence to deal with, but only a conclusion arrived at by a comparison of the two omnibuses, and that, in my opinion, is not sufficient.

Vaughan Williams L.J. I entirely agree. Actions of this kind, which in their origin undoubtedly are actions of deceit—

actions based upon an allegation of deceit on the part of the defendants—have in course of time come to be treated very much as actions brought against defendants for having trenched upon the private rights of the plaintiffs. But in whichever way you regard the present action, in my judgment the conclusion arrived at by the learned judge below cannot be justified, because there can be no doubt that if you do not prove actual deception of the public, in the sense of that section of the public which uses omnibuses or are interested in this matter, you must prove that there is a reasonable probability of deception, or, as it is sometimes expressed, you must prove that there is a resemblance which is calculated to deceive. In my judgment there is no proof in this case of that which it was necessary to allege and prove. It may very well be that in some cases no proof may be required beyond that of the mere resemblance; and the case in the House of Lords of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1) was an example of that sort, because what was there complained of was the taking of a similar name; and it is quite plain that in such a case the similarity is one which would appear to the ear quite independently of the proof of surrounding circumstances, or the proof of the experience of those who had come commercially in contact with the name. But that is not a case in any way resembling the present. The resemblance complained of here is the want of difference of appearance in the details, and it is said that there is such a want of difference that those using the omnibuses are likely to be deceived. In such a case it is obviously possible to give evidence of persons who have been in the habit of using the omnibuses and of persons who have, as officers, either of the plaintiff company or of private omnibus proprietors, been in the habit of checking the user of the omnibuses and seeing the passengers as they get in and out of the omnibuses and hearing complaints of deception. In such a case, if there has been deception, it is possible to give evidence of it; and when a case comes before the Court in which it is possible to give such evidence and in which such evidence

(1) [1899] A. C. 83.

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would obviously be material and important, one draws the very strongest inference from the fact that no such evidence is called or tendered.

In my judgment, this being a case in which the circumstances were such that it was possible to give evidence that the resemblance or want of difference was calculated to mislead —a case indeed upon which it was perfectly impossible for anyone to form an accurate judgment unless there was some such evidence—in such a case it seems to me, with all deference to the learned judge, that his conclusion was not one which can be supported, namely, that merely upon the evidence of the secretary and the painter there was reasonable probability of deception.

Hughes, Q.C. I ask that the action may not be dismissed, but sent back for a new trial. The judge being in our favour upon the facts, we did not call the evidence we might have called.

LORD ALVERSTONE C.J. I cannot think that is the right course. The plaintiffs had an opportunity of giving what evidence they liked. The appeal will be allowed and the action dismissed with costs.

Solicitors: *H. Clifford Turner & Co.; Hicks, Davis & Hunt.*

G. I. F. C.

Principles applied. BEAMAN *v.* A.R.T.S., LTD. [1949] 1 All E.R. 465.

In re McCALLUM. McCALLUM *v.* McCALLUM.

C. A. 1900 Oct. 26, 29; Dec. 4.

[1899 M. 3080.]

Statute of Limitations—"Concealed Fraud"—Third Party—Innocent Possession—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 26—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

Per Lord Alverstone C.J. and Vaughan Williams L.J.: The "concealed fraud" which, by s. 26 of the Real Property Limitation Act, 1833, will prevent time running against the true owner of real estate must be the fraud of the person who sets up the statute, or of some one through whom he claims.

Per Rigby L.J.: Sect. 26 applies to every case of a "concealed fraud" which deprives the true owner of the possession of land, except as regards a bonâ fide purchaser for value without notice of the fraud at the time of his purchase.

In September, 1884, a husband conveyed a freehold house to his wife in fee, and in the same month she executed a conveyance of the house to their daughter in fee. The mother did not inform her daughter of the conveyance, and there was evidence that she purposely concealed it from her. In 1888 the mother died, and in 1899 the father died, having by his will devised and bequeathed all his property to the defendant. The father had continued in possession of the house after the conveyance to his wife and down to the time of his death, and on his death the defendant entered into possession of the house. There was no evidence that the father had any knowledge of the mother's conveyance to the daughter. After his death she was for the first time informed of her title to the house, and she brought an action to recover possession of it from the defendant:—

Held, by Lord Alverstone C.J. and Rigby L.J. (Vaughan Williams L.J. doubting), that there had been a "concealed fraud" by the mother within the meaning of s. 26 of the Real Property Limitation Act, 1833.

But, *held*, by Lord Alverstone C.J. and Vaughan Williams L.J. (Rigby L.J. dissenting), that, if there had been a "concealed fraud" by the mother, yet, as the defendant, and the father through whom she claimed, were not party or privy to the commission of the fraud, s. 26 did not prevent the plaintiff's right from being barred by the statute:

Held, by Rigby L.J., that, as the plaintiff had been deprived of her estate by means of the concealed fraud, s. 26 prevented her right from being barred by the lapse of time.

Decision of Kekewich J. reversed.

Petre v. *Petre*, (1853) 1 Drew. 371, considered.

APPEAL against a decision of Kekewich J.

The action was brought to recover possession of a freehold

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house, called Linden House, at Cheltenham, of which the defendant was in possession.

The defendant pleaded the Real Property Limitation Act, 1874.

The plaintiff claimed the benefit of s. 26 of the Real Property Limitation Act, 1833, alleging that the defendant's possession had been acquired by means of a "concealed fraud."

On September 3, 1884, General McCallum, who was then the owner in fee of the house, in which he was residing with his wife and daughter (the plaintiff), executed a deed by which he voluntarily conveyed the house to his wife in fee.

By a deed dated September 30, 1884, the wife voluntarily conveyed the house to her daughter (the plaintiff) in fee.

Both deeds were admitted to be operative.

The plaintiff was ignorant of the existence of these deeds, which her mother retained in her possession.

On February 22, 1886, she, without the plaintiff's knowledge, deposited the two deeds, which she had placed in a closed envelope, with a London solicitor, Mr. J. C. Asprey, not the solicitor concerned in the preparation of the two deeds, who practised at Cheltenham. The Cheltenham solicitor knew nothing of the deposit of the deeds, and the London solicitor knew nothing of the execution of them.

With the deeds the wife sent to Mr. Asprey a letter which, so far as material, was as follows :—

"I want you to do me the favour of taking charge of the enclosed papers unopened and keeping the envelope till I require it. At my death it is still to be retained for Emily until her father's decease, after which it is to be given to her, provided she is not then the wife of X., as, should that be the case, I never intend to benefit either of them. Should she, however, be a widow at the time of her father's decease (or on mine should I be the survivor), the papers are still to be given to her, but for the present I don't want her even to know where they are." In the original was inserted the name of a gentleman whom it was thought the plaintiff might marry, though she never did.

The mother died on November 18, 1888, having by her will,

dated June 21, 1888, bequeathed all she possessed to the plaintiff. Administration to her estate, with the will annexed, was on December 2, 1889, granted to her husband.

The General died on August 25, 1899, having by his will appointed the defendant sole executrix thereof, and having thereby (after making some specific bequests) devised and bequeathed all the residue of his property to the defendant absolutely.

The General continued in possession of the house from the date of the deed of September 3, 1884, until his death, and after his death the defendant entered into possession.

After the death of the plaintiff's father Mr. J. C. Asprey delivered the envelope with the deeds in it to her, and she then for the first time became aware of her title to the house, though the mother on her death-bed and within twelve years of the commencement of the action made some communication to the plaintiff, which caused her to apply to Mr. J. C. Asprey, who however did not and could not give her any information. On October 19, 1899, she commenced this action, claiming a declaration that she was entitled to the house for an estate in fee simple in possession, and possession thereof, with consequential relief.

There was no evidence that the General had any knowledge of the execution of the deed of September 30, 1884, or of the plaintiff's title to the house.

Kekewich J. held that there had been a concealed fraud on the part of the mother, which had deprived the plaintiff of her property, and that the plaintiff was entitled to the benefit of s. 26. And he ordered the defendant to deliver possession of the house to the plaintiff.

The defendant appealed.

Renshaw, Q.C., and *St. John Clerke*, for the defendant. The plaintiff's contention is that the General as well as his wife fraudulently concealed the two deeds, and that she could not "with reasonable diligence," within s. 26 of the Real Property Limitation Act, 1833 (1), have discovered the fraud until after

(1) "In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall

C. A. 1900 McCALLUM, *In re.* McCALLUM *v.* McCALLUM.

his death. If there was concealed fraud at all, it was on the part of the wife only, not of the General. But it is submitted that there was no fraud at all. The conveyance by the mother to the daughter was not an escrow, for the solicitor who prepared the deed says that it was not only executed but "delivered" by the mother; and it is well settled that if a deed is "delivered" it cannot be an escrow: *London Freehold and Leasehold Property Co.* v. *Baron Suffield.* (1)

[RIGBY L.J. I have always understood that if a deed is once "delivered" it cannot become an escrow.]

The defendant therefore claims by possession adverse to the plaintiff from the date of that conveyance. Sect. 26 saves the rights of persons in any case of "concealed fraud." Now, to prevent the statute from running in favour of the plaintiff, she must prove, not only concealed fraud, but also fraud—that is, designed fraud: *Armstrong* v. *Milburn* (2); *Rains* v. *Buxton* (3); *Petre* v. *Petre* (4); *Lawrance* v. *Lord Norreys* (5); *Willis* v. *Earl Howe.* (6) Mere ignorance does not prevent the operation of the statute; nor is non-disclosure concealment. Moreover, the "fraud" must be that of the person who entered —that is, of the person who reaps the benefit of it and who is relying on the statute, not of a third person, through whom the person in possession does not claim, for that would be introducing into the statute a new equity. If, as is submitted, there was no fraud at all, then the contest is between two innocent parties. Why, therefore, should the defendant, an innocent party, be turned out of possession? Her right under

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be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bonâ fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed."

(1) [1897] 2 Ch. 608.

(2) (1886) 54 L. T. 723.

(3) (1880) 14 Ch. D. 537, 540.

(4) 1 Drew. 371, 397.

(5) (1888) 39 Ch. D. 213, 224; (1890) 15 App. Cas. 210, 216.

(6) [1893] 2 Ch. 545, 551.

the statute is absolute, for the statute does not merely bar the plaintiff's right to recover, but takes away her title: *Dawkins* v. *Lord Penrhyn*. (1)

Warrington, Q.C., and *Martelli*, for the plaintiff. The concealment by the plaintiff's mother of the conveyance to her amounted to a "concealed fraud" within the meaning of s. 26, for it was designed to have the effect of depriving the plaintiff of the estate which belonged to her. Consequently, the period of limitation ran only from the discovery of the fraud, or the date when with reasonable diligence it might have been discovered. Either of those dates in the present case was within twelve years from the commencement of the action. It is not necessary to impute any moral fraud to the mother; she may have thought herself justified in attempting to revoke the conveyance to the plaintiff, or that the deed was of no effect until it was made known to the plaintiff. The question is, Was the mother's motive in concealing the deed to deprive the plaintiff of that which really belonged to her? Of course mere ignorance on the part of the real owner would not be enough to prevent the statute running, but for the purpose of s. 26 there may be a fraud, even though the person who does the act honestly believes it to be right. This is not like an action of deceit in which the plaintiff must prove conscious fraud. Here the mother had made an irrevocable conveyance to her daughter, and circumstances afterwards arose which induced her to wish to revoke it.

[Vaughan Williams L.J. Suppose the mother thought the conveyance was inoperative until it had been communicated to the daughter, and she treated it as that which she believed it to be. Would s. 26 apply under such circumstances?]

It is submitted that it would. Knowing the facts and the right conferred on the plaintiff by the deed, the mother concealed it with the view of depriving the plaintiff of that right. The mother's acts come within the definition of "concealed fraud" given by Kindersley V.-C. in *Petre* v. *Petre*. (2) He said (3) that "concealed fraud" "means a case of designed fraud,

(1) (1877) 6 Ch. D. 318. (2) 1 Drew. 371. (3) 1 Drew. 397.

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by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." The letter written by the mother to Mr. Asprey in 1886 shews that she did not then think that the conveyance to the plaintiff was inoperative until it had been communicated to her. She did not wish the plaintiff to know where the deed was, in order to prevent the plaintiff from asserting a right which she would assert if she was aware of the existence of the deed. The mother, knowing that the plaintiff was entitled to the estate, desired to prevent her from enjoying it.

The Court has always abstained from giving an exhaustive definition of fraud, but at any rate an artifice designed to deceive a person as to his right to property is fraud. That would include the present case. There must have been an intention to deceive the plaintiff, though the mother may (wrongly) have justified her action to herself. There was an intention to prevent the plaintiff from knowing that the property had been conveyed to her in order that she might not claim it.

The statute does not specify the person by whom the fraud must have been committed. The object of s. 26 is to protect the rightful owner. A particular class of persons is protected.

The mother was in the physical possession of the property, though her husband, who was living with her in the house, may also have been in possession. The wife could not exclude the husband: *Symonds* v. *Hallett.* (1) It may be said that there was a fraud also on the part of the father. He knew that he had conveyed the property to his wife, and he also knew that she had made a will devising it to the plaintiff. He may not have known of the conveyance to the daughter. But, knowing of his wife's will, he continued in possession of the property after her death.

With regard to s. 3 of the Act, it is submitted that the daughter, who was living in the house with her father and mother, was then in possession of the house which was really her own property. And if she was in possession at any time during the twelve years the statute would not run.

(1) (1883) 24 Ch. D. 346, 350.

[Vaughan Williams L.J. Can the plaintiff under s. 26 obtain an equity against a person who is in possession of the property by means of the fraud of a third party through whom he does not claim?]

If that be the true view of the section, the final proviso for the protection of a purchaser for value without notice would be unnecessary.

The distinction between legal and moral fraud is illustrated by *Vane* v. *Vane*. (1)

Renshaw, Q.C., in reply. That which the wife did in 1886 is immaterial. If there was any fraud it was committed in 1884. The letter of 1886 shews that she thought the deed of 1884 was ambulatory like a will.

In order that s. 26 may apply, the person who commits the fraud must be the person who benefits by it: *Thorne* v. *Heard* (2); though that case arose on the statute 21 Jac. I., c. 16. In all the cases in equity before the statute of 1833 the person against whom relief was given was the person who had committed the fraud, or some one who claimed through him.

The statute ran from the execution of the deed of 1884. The wife was in possession of the house; the plaintiff was no more in possession of it than a servant living in the house.

Cur. adv. vult.

Dec. 4. Lord Alverstone C.J., after stating the facts, continued:—The question is whether the right of the plaintiff to recover in this action possession of the house is barred by the Statute of Limitations. Upon the facts I come to the conclusion that there was on the part of the mother a concealed fraud within the meaning of s. 26 of the Real Property Limitation Act, 1833. I think the mother intentionally concealed from the daughter that she had given her the house, with the intention that the deed of conveyance should not become known to her except in certain events. In my opinion, however good was the motive which prompted her action, this was a

(1) (1873) L. R. 8 Ch. 383. (2) [1895] A. C. 495.

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concealed fraud within the meaning of s. 26. I further find, however, that the General was no party to the fraud. I draw the conclusion from the facts that he had forgotten all about the conveyance of September 3, 1884, and there is no evidence that he ever knew of the execution by his wife of the deed conveying the house to the plaintiff. I further find that he remained in possession of the house or dealt with it as his own down to the time of his death.

The question then arises, whether, at the commencement of the action, the statute had run against the plaintiff, or whether the concealed fraud of the mother can be prayed in aid as an answer to the possession of General McCallum and the defendant. I am of opinion that, in order to prevent the operation of the statute, the fraud contemplated by s. 26 must be the fraud of the person setting up the statute, or of some one through whom he claims. I think that this is the construction which I should have put upon the section if I had no other opinion to guide me. I read the words "may have been deprived by such fraud" as intended to point to the action of the person who is seeking to rely upon the statute, and, when the state of the law prior to the passing of the Act is considered, and the opinions of the judges since that date are regarded, I do not think it is possible to come to any other conclusion. As I understand it, the old jurisdiction exercised by the Courts of Equity rested upon the fact that the conscience of the party who was setting up possession as against the title of the true owner was affected, so that he ought not to be allowed to avail himself of the lapse of time. This is the reason given by Lord Redesdale, when Lord Chancellor of Ireland, in *Hovenden* v. *Lord Annesley* (1); and when Kindersley V.-C., in *Petre* v. *Petre* (2), was considering the meaning of the same section, he used these words: "It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." This passage is quoted verbatim

(1) (1806) 2 Sch. & Lef. 607, 634; 9 R. R. 119. (2) 1 Drew. 397.

in Lord St. Leonards' Real Property Statutes, 2nd ed. p. 98. It may be said of course that these statements of the law are not exhaustive, but I cannot think that such judges would have used the words they do—namely, "by means of such concealment enables him to enter and hold"—if they had contemplated that this section of the statute was dealing with cases of the fraud of third persons (through whom the person in possession does not claim), of which fraud the person claiming the benefit of the statute is wholly innocent. Similarly in *Willis* v. *Earl Howe* (1), Kay L.J. approved of the passage already cited from *Petre* v. *Petre* (2), and added: "But the word 'concealed' seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge, but the concealment of those facts." And, lastly, in *Thorne* v. *Heard* (3), Lindley L.J. in the Court of Appeal stated the principle of the law in the way I have indicated, and referred to the authorities above mentioned; and Lord Davey, in the House of Lords (4), used language which, though it was uttered with reference to another statute, in my opinion lays down the principle of construction which we ought to apply to this Act, an Act only laying down a uniform rule as to the length of time which must have elapsed since possession taken in order to oust the true owner. For these reasons I come to the conclusion that the plaintiff's title is barred by the Statute of Limitations, and that this appeal ought to be allowed.

Rigby L.J. The question is whether the plaintiff's right to recover a dwelling-house at Cheltenham is or is not reserved to her by s. 26 of the Real Property Limitation Act, 1833. Kekewich J. has decided that it is, and, in my judgment, his decision is right.

The main contention before us has been that, because the

(1) [1893] 2 Ch. 545, 552.
(2) 1 Drew. 397.
(3) [1894] 1 Ch. 599.
(4) [1895] A. C. 506.

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defendant and her alleged predecessor in title were personally ignorant of any fraud down to the time when, but for fraud, the statute would have run, the defendant is entitled to hold as against the plaintiff. A doubt also has been suggested whether the plaintiff was deprived of her land by the fraud. [His Lordship read the material words of s. 26, and continued :—]

These words appear to me not to be open to any doubt as to their meaning. They are applicable to every case of a concealed fraud which deprives the owner. Their generality is limited only by the proviso in favour of bonâ fide purchasers for value without notice at the time of the purchase. This proviso has no application (as there has been no purchase for value) to the present case, though it may serve to rebut certain suggestions which have been made (in my judgment without foundation) as to the construction of that part of the section which is directly applicable. It is indeed difficult to see how an exception or proviso (in opposition to an equitable rule) in favour of innocent volunteers which has been set up in this action and negatived by Kekewich J. can be implied side by side with the express proviso in favour of bonâ fide purchasers for value which only affirms the pre-existing equitable rule. [His Lordship stated the facts substantially to the effect above given, and continued :—]

Now, it cannot be questioned that the scheme planned and carried out by the wife was a fraud upon the plaintiff. The wife wished, notwithstanding the conveyance to the plaintiff, to retain to herself a certain control over the property, and the scheme was contrived and intended to secure upon her death a life estate to her husband, and this scheme succeeded. By her contrivance her husband continued to hold possession until his death. That the fraud was a concealed fraud is plain from the above statement, and that it could not have been discovered by reasonable diligence is also plain. Was it a fraud that deprived the plaintiff of her land? By that fraud, and from no other cause, she was kept out of possession and enjoyment during the whole of her father's life. There is no evidence that the father knew anything of the conveyance to the plaintiff, and we must assume that he did not. But suppose that

he had at any time been told of the daughter's title, as an honest man he could not have joined in the concealment of it from her, otherwise he would have become particeps criminis. There is no reason to suppose that he would have tried to do so, but, if she had become aware of her right, she might at any time before October, 1896, have recovered possession by action of ejectment, to which there could have been no defence. The fraud, therefore, and the concealment thereof were the sole and efficient cause of the deprival. The alternative that the plaintiff might have been deprived by the father's continuing in possession appears to me inadmissible. That did not deprive her of her land, but at most of the possession of it. The Statutes of Limitation give no title whatever to trespassers or squatters before the determination of the time limited by the statute for bringing any action or suit, upon which determination s. 34 applies and extinguishes the right of the true owner. As to a suit in equity, s. 26 must determine what the time is—that is to say, twenty (now twelve) years from the discovery of the fraud. Trespasser the father was, and trespasser he remained after 1896, as well as before. In the judgment of the Court of Appeal (James and Mellish L.JJ.) in *Vane* v. *Vane* (1), pronounced by James L.J., there occur the following passages (2): "It was, indeed, attempted to be argued that, as the plaintiff's right was a clear legal right which became vested in him at his father's death, with no legal bar or impediment to prevent his taking possession of or recovering the estates, and the defendants' possession originating in a mere trespass, being, in point of law, mere squatting on the property, this Court would not interfere." And a little further on he says: "We are of opinion that the law gives no special privilege to the length of squatting possession. It must always be borne in mind that in all questions under the Statute of Limitations this Court has nothing to do with the nature, origin, or duration of the defendant's possession, but simply whether the plaintiff has or has not proceeded in due time after the accruer, or that which is to be taken to be the accruer, of his right of suit. An estate may have been enjoyed as a fee simple estate for generations

(1) L. R. 8 Ch. 383. (2) L. R. 8 Ch. 396, 397.

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through any number of devolutions or dispositions, or may have been held by squatters successively for many years, without creating any bar to the proceedings of a rightful owner under a title newly accrued. And there is not, in our judgment, in this respect any difference whether the accruer is on the determination of a previous estate or on the discovery of a concealed fraud." The law here laid down as to the discovery of a concealed fraud giving, as it were, a new right in equity, coincides with what was said again and again by Lord Redesdale (when Lord Chancellor of Ireland) in the course of his judgment in *Hovenden* v. *Lord Annesley*. (1) I have carefully reperused the judgment in that case, and I find nothing in it inconsistent with the judgment which I am now pronouncing. It is true that in commenting (2) on *Booth* v. *Earl of Warrington* (3) he uses the expression "the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time." It is true also that in that case Booth (the defendant) was himself the perpetrator and concealer of the fraud. But Lord Redesdale cannot reasonably be interpreted as implying (he certainly does not say) that in no case can a defendant be bound in conscience unless he knew of the fraud at the time of its perpetration, or afterwards before the statute created a legal bar. The important time to consider is when a suit is brought by the rightful owner to recover the property. If the defendant then knows, as he must do on the fraud being established by evidence, that he and all persons through whom he claims have held entirely by virtue of the fraud, it is (to use the expression of Lord Redesdale) against conscience for him to claim the continued benefit of the fraud.

In *Huguenin* v. *Baseley* (4) Lord Eldon (5), with reference to the case of the wife and children of Baseley born or to be born (all innocent of any fraud), citing with approval *Bridgeman* v. *Green* (6), decided by Lord Hardwicke L.C. in 1755 and reheard before Wilmot C.J. and the other Lords Commissioners in 1757, said: "Lord Hardwicke observes justly, that, if a person

(1) 2 Sch. & Lef. 607; 9 R. R. 119.
(2) 2 Sch. & Lef. 634.
(3) (1714) 4 Bro. P. C. 2nd ed. 163.
(4) (1807) 14 Ves. 273; 9 R. R. 276.
(5) 14 Ves. 289.
(6) (1755) 2 Ves. Sen. 627; (1757) Wilm. 58.

could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud" (i.e. fraud by a stranger); and later on he says (1): "This was also the doctrine of Lord Thurlow in the case that has been referred to—*Lutterell* v. *Lord Waltham.*" (2) Lord Eldon states that case as follows (3): "The object of the bill in that case was, that an estate should be enjoyed, as if a recovery had been suffered; upon the ground, that Lutterell had, while Lord Waltham was upon his death-bed engaged in suffering a recovery, prevented it, with the view that the estate should devolve upon the person with whom he was connected. That estate was by the law vested in that individual: a much stronger case therefore than the acquisition of property through imposition. Lord Thurlow, whatever might have been his final decision upon that case" (it was tried on demurrer, see *Dixon* v. *Olmius* (4), and is very imperfectly reported), "had no doubt that it was against conscience that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case so much at large, if it had been no more than that." Lord Eldon adopted the opinion of Lord Thurlow, and decided the case before him against the innocent wife and children on the strength of it. It is obvious that the principle was wide enough to extend to every case of an innocent person claiming when his right is shewn to depend upon a fraud committed by another.

Scholefield v. *Templer* (5) was a case of concealed fraud, the suit being against a defendant who was innocent of the fraud, but who had gained an advantage from it (namely, a release from his liability as surety) of which the plaintiff sought to deprive him on the ground of the fraud. He defended the suit on the ground of his innocence, but unsuccessfully, both in the Court of first instance and on appeal, and the release was set aside. The situation, therefore, was more favourable to the

(1) 14 Ves. 290.
(2) (1787) Cited 11 Ves. 638.
(3) 14 Ves. 290.
(4) (1787) 1 Cox, 414.
(5) (1859) Joh. 155.

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defendant than that of a defendant to an action to recover land on the ground of concealed fraud. The defendant was not claiming something which he had not got, but only to retain that which he had already. The defendant in a suit to recover land claims to have a mere squatter's title turned into a fee simple. The counsel for the plaintiff in *Scholefield* v. *Templer* (1) relied upon *Huguenin* v. *Baseley* (2), and the defendant's counsel did not contest the applicability of that class of cases in general, but argued that the case of principal and surety was an exception to the general rule. The judgment of Page Wood V.-C. contains the following passages (3): "This case is brought within the broad principle, that no one can avail himself of fraud. As it was held in *Huguenin* v. *Baseley* (2), and the other cases cited in argument, where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself"; and again (4): "The truth is, that, in all cases of this kind, where a fraud has been committed, and a third person is concerned who was ignorant of the fraud, and from whom no consideration moves, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it; but when once he seeks to derive any benefit from it, he becomes a party to the fraud." The Vice-Chancellor dismissed the argument founded upon the relation of principal and surety without hesitation. On appeal from this decision Lord Campbell, in a judgment in which Knight Bruce and Turner L.JJ. concurred, said (5): "I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration." This adoption of the reasoning of the Vice-Chancellor plainly shews that the Court of Appeal intended to treat *Huguenin* v. *Baseley* (2) as part of the settled law of the Court.

(1) Joh. 155.
(2) 14 Ves. 273; 9 R. R. 276.
(3) Joh. 162.
(4) Ibid. 165.
(5) (1859) 4 De G. & J. 429, 433.

It was, therefore, well established, by authoritative decisions binding on the Court of Appeal, and not to be questioned here, that, independently of the Real Property Limitation Act, 1833, a suit in equity might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued, and those through whom he claimed as predecessors in title, had not been party or privy to the fraud at the time when it was perpetrated. It would be strange, indeed, if a statute intended for the limitation of actions and suits relating to real property should be found to contain such a substantive alteration in the law as a change when the Act came into force of the fundamental principles on which suits in equity in cases of fraud were theretofore tried. It has, however, always been treated as clear that no change in the substantive principles of equity was intended by the Act.

I refer again to the facts of the present case, and for the sake of argument make the supposition that the fraud had been discovered and an action brought in the father's lifetime, but after 1896. The proof of the fraud and its concealment would have been simple, and the father could not in defence have claimed to have his squatter's title changed into a fee simple by virtue of his wife's fraud committed for his benefit and known to him at the trial. The death of the father and the entry of the defendant can make no difference.

The appellant construes s. 26 so as to exclude all cases in which the defendant, by himself or his predecessors in title, was not before the discovery of the fraud party or privy to it. No decided case has been cited in which this construction has been adopted and made the ground of decision. If such a case were produced we should have to consider whether it was binding on us sitting as a Court of Appeal. Obiter dicta of text-writers and judges, not always correctly appreciated, have alone been relied upon. With regard to these, it is sufficient to say that no dicta of text-writers or judges, however eminent, if contrary to fixed principle or the words of a statute, can have the force of an amending Act of Parliament, or absolve us from the duty of ourselves applying the principle or construing the Act. All the dicta relied upon depend more or less on the explanation of

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concealed fraud given by Kindersley V.-C. in 1853: *Petre* v. *Petre*. (1) That explanation, treated as referring to the circumstances of that case, cannot be questioned. Treated as applying to all cases, whatever their circumstances, it becomes a mere dictum, and one that is irreconcilable with the doctrine of *Huguenin* v. *Baseley*. (2) There is no reason why the Vice-Chancellor, who certainly was not ignorant of what the Court of Appeal called in 1859 a well-established principle, should have meant it to be so treated. All such dicta must be interpreted, and, if necessary, limited, so as to accord with the fixed principle or the statute in question. One danger of treating such obiter dicta as authorities is that, if stated only in general terms, one may be applying them to circumstances which the authors never had in mind. In other words, we may be treating as exhaustive what the authors intended only to apply to special circumstances. All the dicta relied upon might be explained and brought into accordance with the whole line of authorities by interpreting "fraud by him or his predecessors" and similar phrases as including fraud properly imputable to him or them whether originally or at the trial. This might, without legal inaccuracy, be treated as fraud by him or them. *Thorne* v. *Heard* (3) was a case in which the construction of the statute of 1833 did not come into question, directly or indirectly. It depended solely on the question whether, under the Trustee Act, 1888, the trustees were party or privy to a fraud so as to bring them within the language of the exception contained in the Act. In my judgment, this appeal ought to be dismissed.

Vaughan Williams L.J. I agree with the judgment of the Lord Chief Justice.

In my judgment, to bring into operation s. 26, a "concealed fraud" must be the fraud of, or in some way imputable to, the person who invokes the aid of the statute. It seems to me that the words of s. 26 sufficiently indicate that the intention of the Legislature, at the time when it enacted a legislative

(1) 1 Drew. 371, 397.
(2) 14 Ves. 273; 9 R. R. 276.
(3) [1894] 1 Ch. 599; [1895] A. C. 495.

rule respecting the period within which relief might be granted to those seeking to recover any land or rent of which they might have been deprived, was to reserve to Courts of Equity that jurisdiction which those Courts had always exercised to relieve against "concealed fraud," when discovered.

The right given by the section is a right to bring a suit in equity. The right to bring a suit in equity was, before the statute, based upon well-established principles — principles which, to my mind, clearly render it necessary that the plaintiff in such a suit should rely on and prove a "concealed fraud" which was the fraud of, or a fraud in some way imputable to, the defendant. The plaintiff had to prove facts so affecting the conscience of the defendant that he ought not to be allowed to avail himself of the length of time fixed generally by the Statute of Limitations.

I think also that the concealment must, according to the principles acted on by Courts of Equity, have been a concealment by the defendant or imputable to him, and that the "concealed fraud" must have deprived the plaintiff, or his predecessors in title, of the estate.

There is a good deal of authority as to this, to which I will refer shortly. But, independently of these authorities, I am justified in the view which I have taken by the fact that I have not been able to find a single case in which relief has been granted in which the interest or estate held by the defendant had not been derived through the fraud. Thus, in *Huguenin* v. *Baseley* (1), the wife and children of the defendant, although innocent of the fraud which had procured the execution of the settlement, yet claimed to take the benefits of that settlement thus fraudulently procured. *Bridgeman* v. *Green* (2), and other cases cited in the notes to *Huguenin* v. *Baseley* (1), are all cases in which the defendants relied for their title on that which had been obtained by fraud. Again, in *Scholefield* v. *Templer* (3), the ground of the decision was, that the defendant, a surety innocent of the fraud by which the principal debtor had obtained a release, could not in equity avail himself

(1) 14 Ves. 273; 9 R. R. 276. (2) 2 Ves. Sen. 627.
(3) Joh. 155.

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of the fact that the principal debtor had been thus released, because, if you avail yourself of fraud in order to obtain for yourself any benefit, you then become particeps criminis; whereas in the present case not only was neither the defendant nor the General party to the fraud of Mrs. McCallum, but also neither the General nor the defendant obtained or held possession of the land by availing themselves of that fraud. They were simply trespassers, and there is nothing against conscience in their availing themselves of the lapse of time during which the occupation has continued to the exclusion of the plaintiff, since that occupation was not due to fraud or in any way connected with it. It was at worst a wrongful occupation which deprived the plaintiff of her land, and not a concealed fraud.

Amongst the older authorities as to the jurisdiction formerly exercised by Courts of Equity may be mentioned *Hovenden* v. *Lord Annesley* (1) and *Bowen* v. *Evans.* (2) Lord Cottenham said in the latter case (3): "Upon fraud clearly established no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the effects of their plunder." And amongst modern authorities may be mentioned, first, *Petre* v. *Petre* (4), in which Kindersley V.-C. said (5): "What is meant by 'concealed fraud'? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables *himself* to enter and hold." That was a decision on s. 26 itself. It has been suggested that the language used by the Vice-Chancellor is accounted for by the fact that there he had to deal with a case in which the alleged "concealed fraud" was chargeable against the defendant himself. But I will observe that Lord St. Leonards in his Real Property Statutes, 2nd ed. at p. 98, adopts those words of the Vice-Chancellor as applying generally to the meaning of the

(1) 2 Sch. & Lef. 607; 9 R. R. 119.
(2) (1848) 2 H. L. C. 257.
(3) 2 H. L. C. 282.
(4) 1 Drew. 371.
(5) 1 Drew. 397.

words "concealed fraud" in this section, and Kay L.J. in his judgment in *Willis* v. *Earl Howe* (1), quoting this passage from the judgment of Kindersley V.-C., treats the proposition therein contained as one of general application, and not as referring only to the facts of the particular case before the Vice-Chancellor. Kay L.J. said (2): "It is not merely an 'unknown fraud.' But the word 'concealed' seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry."

Next came *Thorne* v. *Heard*. (3) That case was not decided on s. 26 of the Act of 1833, but on the Trustee Act, 1888. It is provided by s. 8 of that Act that (paragraph 1, clause (*a*)) "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding" (namely, any action except when a claim is founded on fraud to which the trustee was party or privy) "if the trustee or person claiming through him had not been a trustee or person claiming through him." The action, therefore, directly raised the question, what were the rights of the defendant in respect of a Statute of Limitations (21 Jac. I., c. 16) which contained no express reservation of the jurisdiction of equity; in other words, the case directly raised the question what were the limits within which a Court of Equity, apart from statutory enactment, would restrain a defendant from setting up the defence of the Statute of Limitations, or enforce the rights of the plaintiff, notwithstanding the lapse of the legal statutory time, and give effect to the rights in equity of the deprived owner. In that case Lord Davey said (4): "In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of or in some way imputable to the person who invokes the aid

(1) [1893] 2 Ch. 545.
(2) Ibid. 552.
(3) [1894] 1 Ch. 599; [1895] A. C. 495.
(4) [1895] A. C. 506.

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of the Statute of Limitations." And Lord Herschell, though he did not make a concise statement of principle like that made by Lord Davey, yet clearly decided the case on the same principle, because, after finding that there was fraud and concealment by one Searle, he decided that this did not prevent the defendant from raising the defence of the Statute of Limitations, because he (the trustee) was not privy to the fraud or the concealment; and Lord Macnaghten said (1): "By a recent and I think a very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely on any Statute of Limitations as fully as anybody may do who is not a trustee, provided his conduct has been free from any taint of fraud, and provided he has not derived and is not in a position to derive any personal benefit from the transaction impeached as a breach of trust." It is true that in that case no part of the property taken by Searle ever came to the hands of the defendant, of whom Searle was neither the partner nor the agent acting within the scope of his authority, and that the only sense in which the defendant took the benefit of the concealed fraud by Searle was that he took advantage of the fact that Searle, by regularly paying the interest on the trust money which he had stolen, led the plaintiff to remain in ignorance of the breach of trust, and to abstain from taking proceedings against the defendant in respect of it. In that same case in the Court of Appeal Lindley L.J. expressed himself in the same sense. First he said (2): "The point whether s. 26 applies only to frauds committed by the defendant or those through whom he claims, or whether it extends to frauds committed by strangers, will be found alluded to by Kay L.J. in *Willis* v. *Earl Howe* (3), and he, following Kindersley V.-C. in *Petre* v. *Petre* (4), expressed his opinion that the fraud, to avail the plaintiff, must have been committed by the defendant or some person through whom he claimed. This accords with Lord Redesdale's opinion in *Hovenden* v. *Lord Annesley*. (5) He puts the doctrine of concealed fraud thus: He says that

(1) [1895] A. C. 504.
(2) [1894] 1 Ch. 604.
(3) [1893] 2 Ch. 545, 552.
(4) 1 Drew. 397.
(5) 2 Sch. & Lef. 634.

the defendant's conscience is so affected that he ought not to be allowed to avail himself of the statute or lapse of time." Again, Lindley L.J. said (1): "The equitable doctrine respecting concealed fraud is based on the moral injustice of allowing a man to take advantage of his own fraud and concealment."

Having dealt thus far with the basis of the equitable doctrine of concealed fraud, and with judicial opinion as to the meaning of the words "concealed fraud," I wish to add that the view of Kay L.J., that the fraud must have deprived the claimant or his predecessors in title of the estate, has already been fully established by the judgment of Lord Herschell in *Lawrance* v. *Lord Norreys*. (2) And I wish to point out two reasons why *Scholefield* v. *Templer* (3) has no application to the present case. First, because in that case the defendant sought to take a benefit from the very fraud which he said had deprived the plaintiff of his right of action against him (the surety), whereas in the present case neither the defendant nor the General in any sense adopts or seeks to take a benefit from the fraud of the plaintiff's mother. Secondly, because the fraud of the plaintiff's mother had nothing to do with the possession of General McCallum, or the depriving the plaintiff of her land. She was deprived of her land by the possession of her father, not by the fraud of her mother. His possession may have been wrongful as against his wife, and after his wife's death it may have been wrongful as against his daughter, but in neither case did he obtain or hold possession by fraud, and, in my judgment, wrongful possession by a trespasser is not "concealed fraud" within the meaning of s. 26.

Upon the facts of this case I think we are all agreed, first, that the possession of the General was not the possession of his wife; at all events, it was not so after her death; secondly, that neither the General nor the defendant were privy to the fraud of Mrs. McCallum. I think, therefore, that this appeal should be allowed, and that judgment should be entered for the defendant.

(1) [1894] 1 Ch. 605. (2) 15 App. Cas. 210.
(3) Joh. 155.

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I wish to add one word about Mrs. McCallum. I think that, quite consistently with the evidence, she may have been innocent of moral fraud. She may well have supposed that the conveyance to her daughter was of no effect until she had communicated the fact of its execution to her, or delivered it to some one to hold for her. I am not sure that the fact that she did not disclose to her daughter the conveyance which she had executed would constitute "concealed fraud," if she honestly supposed that the conveyance was of no effect. Mr. Warrington opened his case by disclaiming any charge of moral fraud. It is true that ultimately he contended that Mrs. McCallum must be judged by her acts, and that what she did was a fraud upon her daughter, and I think I ought to say that I am by no means satisfied that she was guilty of a fraud. But, taking the view which I do of this case, it is unnecessary to determine whether the plaintiff's mother was guilty of "concealed fraud" within the meaning of s. 26, though I should hesitate to come to that conclusion.

Solicitors: *Field, Roscoe & Co., for Bubb & Co., Cheltenham; J. W. Asprey.*

W. L. C.

LILY, DUCHESS OF MARLBOROUGH *v.* DUKE OF MARLBOROUGH.

C. A. 1900 Dec. 10.

[1899 M. 3645.]

Settlement—Power of Jointuring—Construction—Validity—Public Policy—Power to appoint Jointure "to any Woman whom he may Marry"—Second Marriage after Divorce at instance of First Wife.

By a deed of resettlement of family estates power was given to the second tenant for life "to appoint to any woman whom he may marry" for her life a jointure rent-charge not exceeding the yearly sum of 2500*l.*, to be charged on the estates. And it was declared that the power might be exercised as often as the donee should marry. There was a proviso that the charge on the estates by way of jointure should not at any one time exceed in the whole the annual sum of 4000*l.*

In 1869 the donee married, and by a settlement made on his marriage he, in exercise of the power, appointed to his wife during her life, in case she should survive him, a jointure rent-charge of 2500*l.*

In 1883 the marriage was dissolved on the wife's petition. In 1888 the donee married again, and by a post-nuptial settlement he, in exercise of the power, appointed to his second wife, during her life, in case she should survive him, a jointure rent-charge of 2500*l.*

In 1892 the donee died. Both the wives survived him:—

Held, that the appointment of a jointure to the second wife was authorized by the power, though she could not receive more than 1500*l.* a year during the life of the first wife:

Held also, that, though the power operated to make provision for the event of a divorce of the donee from his first wife, it was not thereby rendered illegal or contrary to public policy.

Cartwright v. *Cartwright*, (1853) 3 D. M. & G. 982; *H.* v. *W.*, (1857) 3 K. & J. 382; and *Cocksedge* v. *Cocksedge*, (1844) 14 Sim. 244, distinguished.

Decision of Byrne J. affirmed.

APPEAL against a decision of Byrne J., the question being whether the plaintiff was entitled to a jointure rent-charge charged upon settled freehold estates of which the defendant, the ninth Duke of Marlborough, was tenant for life.

By a deed of resettlement of the estates, dated July 14, 1866, the estates were appointed, subject to (inter alia) a jointure rent-charge of 2500*l.*, to be paid to Frances Anne, the wife of the seventh Duke, to trustees, for a term of 1300 years, upon

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trusts for raising the sums of money therein mentioned, and subject thereto to uses for securing some rent-charges determinable on the death of the seventh Duke, and subject as aforesaid to the use of the seventh Duke during his life; with remainder to the use of his eldest son, the Marquis of Blandford (afterwards the eighth Duke), during his life, with remainder to the use of his first and other sons successively in tail male, with remainders over in strict settlement. And the Marquis was thereby empowered, either before or after his marriage with any woman, by deed or will "to appoint to any woman whom he may so marry for her life or for any less period" any yearly rent-charge or rent-charges by way of jointure not exceeding in the whole, if he should survive the seventh Duke, the yearly sum of 2500*l.*, to be charged upon all or any of the premises thereby appointed, and to appoint to such woman usual powers and remedies for recovering and enforcing payment of the said rent-charge or rent-charges respectively by distress and entry upon and detention of possession and perception of the rents and profits of the premises charged therewith. And it was thereby declared "that the said power of jointuring hereinbefore contained may be exercised as often as the said Marquis of Blandford shall marry."

A similar power of jointuring was given to each male tenant for life under the limitations subsequent to the limitations to the first and other sons of the Marquis, and it was declared that that power might be exercised as often as the person entitled to exercise the same should marry. And it was thereby declared that the premises thereinbefore appointed or any part thereof should not by means of the jointure rent-charge of 2500*l.* limited to Frances Anne, Duchess of Marlborough (by an earlier settlement), or by means of jointure or jointures created under the powers of jointuring thereinbefore contained or either of them, be at any one time subject or liable to the payment of any annual sum or annual sums for jointures exceeding in the whole the sum of 4000*l.*, ... and that the jointure rent-charge of 2500*l.* limited to Frances Anne, Duchess of Marlborough, should take effect to the full extent in preference to any charge made under either of the powers of jointuring

thereinbefore contained, and every charge made by a prior tenant for life (including the Marquis), should take effect to the full extent of the annual sum limited by him for such charge, or for so much thereof as should be charged, in preference to any charge or charges by a posterior tenant for life or posterior tenants for life.

In November, 1869, the Marquis of Blandford married Lady Albertha Hamilton, and by the settlement, dated November 6, 1869, made on the marriage, he, in exercise of the above-stated power given to him by the resettlement of 1866, appointed to the use of the Marchioness during her life, in case she should survive him and if he should survive the seventh Duke, the yearly rent-charge of 2500*l*., to be charged upon the estates comprised in the resettlement of 1866.

The seventh Duke died on July 4, 1883, and the Marquis thereupon became the eighth Duke.

On the petition of the Marchioness a decree nisi was on February 10, 1883, made for the dissolution of her marriage with the Marquis, and the decree was made absolute on November 20, 1883, after he had become eighth Duke.

On June 29, 1888, the eighth Duke married the plaintiff.

On December 5, 1888, a post-nuptial settlement was executed, by which the eighth Duke, in exercise of the above-mentioned power vested in him by the resettlement of 1866, appointed to the use of the plaintiff during her life, in case she should survive him, a yearly rent-charge of 2500*l*. by way of jointure, to be charged upon the estates subject to the uses limited by the resettlement of 1866.

On November 9, 1892, the eighth Duke died.

On April 16, 1899, Frances Anne, Duchess of Marlborough, died.

The defendant, the ninth Duke, son of the eighth Duke, attained twenty-one on November 13, 1892, and the next day he executed a deed disentailing the settled estates. On November 6, 1895, he married, and on July 19, 1897, in pursuance of an ante-nuptial agreement, he executed a settlement of the estates under which he became tenant for life. And he thereby appointed a jointure to his wife charged on the settled estates.

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The defendants to the action were the ninth Duke and his wife; their infant son, the Marquis of Blandford; the trustees of the settlement of 1897; and the trustee of the settlement of 1888.

The plaintiff claimed a declaration that the settlement of 1888 was, on the true construction of the resettlement of 1866, a valid appointment in her favour of a jointure rent-charge of 2500*l.*, and consequential relief.

Byrne J. held, on the construction of the resettlement of 1866, that the plaintiff's claim was well founded, but that she could not receive more than 1500*l.* a year during the life of the Marchioness of Blandford.

The defendants (other than the trustee of the settlement of 1888) appealed.

Haldane, Q.C., and *Ashworth James*, for the appellants. (1.) On the true construction of the resettlement of 1866 the Marquis had no power to appoint a jointure to a second wife during the lifetime of his first (divorced) wife. At any rate the power is only to appoint a jointure of 2500*l.*, and, the whole of that sum having been appointed to the first wife, no further sum could be effectually appointed during her life. The object of the provision that the power of jointuring might be exercised as often as the Marquis should marry was only to exclude the old notion that such a power when once exercised was exhausted. The clause is a common one in settlements, and was introduced before it had been decided, as in *Zouch* v. *Woolston* (1), that such a power is not at an end when it has been once exercised. But that case is no authority for saying that the power enables the donee to appoint jointures to two women at once.

(2.) But, if on its true construction the power authorizes an appointment to a second wife during the life of the divorced wife, it is contrary to public policy and illegal. It is contrary to public policy that provision should be made in a settlement for the possible future separation of husband and wife: *Cartwright* v. *Cartwright* (2); *H.* v. *W.* (3); *Cocksedge* v.

(1) (1761) 2 Burr. 1136. (2) 3 D. M. & G. 982. (3) 3 K. & J. 382.

Cocksedge. (1) The principle of those decisions applies here. If a condition is contrary to public policy it is illegal and void: *Egerton* v. *Earl Brownlow*. (2) If the deed had said in express words that after the divorce of a first wife a jointure might be appointed to a second wife, the first being still alive, that provision would have been illegal. And the result must be the same if the words actually used bear that construction.

Levett, *Q.C.*, and *Brinton*, for the plaintiff, were not called upon.

W. H. Cozens-Hardy, for the trustee of the settlement of 1888.

RIGBY L.J. The points raised on this appeal are two. First, whether, upon the construction of the resettlement of 1866, the Marquis of Blandford (afterwards the eighth Duke of Marlborough), who had already in the exercise of the power contained in that deed appointed to his first wife a jointure rent-charge of 2500*l*., could upon his second marriage during the lifetime of the first wife, who had obtained a divorce from him, appoint a jointure rent-charge of 2500*l*. to his second wife, the plaintiff in this action. That is the first point. The second point is, whether if that question is answered in the affirmative, it was within the competence of the parties to the deed of 1866 to bargain for a power which might in its exercise have such a result.

It appears to me that the case is by no means open to the difficulties which have been suggested. First, upon the point of construction, I should observe that the deed of 1866 is not a marriage settlement, or anything of that kind, but a resettlement of the estates on a family arrangement. [His Lordship read the material clauses of the deed as above stated, and continued:—]

We have there a clear power for the Marquis to appoint a jointure to "any woman whom he may marry," which, by the express terms of the deed, is to be exercisable as often as he shall marry, and, as a safeguard to the estate that it might

(1) 14 Sim. 244. (2) (1853) 4 H. L. C. 1, 160, 196.

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not be overburthened, there is a provision limiting the amount to be charged on the estate by way of jointure to 4000*l*.

Now it is argued upon the construction of the deed that that power does not include a second wife, when the first wife, having obtained a divorce, is living at the date of the second marriage. I am unable to grasp this argument. If I were considering the propriety of the terms of the settlement, and the idea had occurred to my mind what was to happen in the event of the second marriage of a tenant for life during the lifetime of a lady who had been his wife and who had obtained a divorce, I can see that there might be reasons for making a provision different from that which is here made. But I cannot find anything in this deed pointing to such a state of circumstances. It is said that the provision that the power may be exercised as often as the Marquis shall marry was intended solely for the purpose of removing the doubt which had at one time existed, whether, having been exercised once, a power of jointuring could be exercised again. This may be one of the reasons for which the clause was introduced, but I know of no authority which entitles us to hold that the clause is limited to that purpose. We are bound to take the words as we find them, and they are absolutely without any doubt or difficulty. It appears to me clear that the eighth Duke was as much entitled to make an appointment under the power on his second marriage as he was on his first marriage, notwithstanding that his first wife was living at the date of the second appointment. So much for the construction of the deed.

As to the suggestion that the parties were not competent to bargain for such a dealing with the property, on the ground that it would be against public policy, there is not a syllable to be found in the deed which is contrary to public policy. But it is said that if we construe the power so as to let in the second wife's jointure, it would operate in a way which would be contrary to public policy. I have some difficulty in following this argument, but I suppose the meaning is that a divorce would be rendered more beneficial or less injurious to the husband than it otherwise would be. It is admitted that this

argument must extend to the children of the second marriage, and that an appointment could not be made in their favour under the power of appointing portions in the same way as if the second marriage had taken place after the death of the first wife. I do not see that it would be possible not to push the argument to that extent. Three cases were cited, one of them being a decision of the Court of Appeal, which, of course, we should follow if we thought it was binding upon us in the present case. All these cases are alike in one respect. The parties to a marriage settlement, or what was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the spouses. There can be no doubt that such a bargain is absolutely bad. All that was there held was that, if persons choose to bargain about an event which they are not entitled to anticipate, their bargain will be bad. And in *Cartwright* v. *Cartwright* (1), in the Court of Appeal, this was carried so far that where a father was settling property on the marriage of his son, and he stipulated that, if a separation should take place between the husband and wife, the income should, from the time of the separation, during their joint lives be paid to the husband, the Court held that the son could not gain an advantage dependent upon the separation which in fact afterwards took place. It was said that the son could not derive any interest under the fraudulent act of another, and that it was a fraud on the law for the father to enter into such a stipulation. I cannot see any resemblance between the present case and any of those three cases. They are perfectly intelligible in principle, but it is, I think, equally clear that the principle does not apply to the present case. On both points, I think, the decision of Byrne J. must be affirmed, and the appeal dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree. I will first say a word about the point of public policy. In all the three cases cited by Mr. Haldane there was to be found on the face of the instrument an express bargain for that which was contrary to

(1) 3 D. M. & G. 982.

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public policy. In the present case it cannot be suggested that there is anything on the face of this clause in the resettlement which is contrary to public policy. It is only said that, in what I may call its accidental application, such a clause might operate as an inducement to the husband to look forward to a divorce, because he would know that in the event of a divorce he might be able to marry some other woman, and to provide for her out of the family estates. Speaking for myself, I very much doubt whether, even if this clause had been written out at large in the way which Mr. Haldane suggested, it would have been contrary to public policy. Public policy like other things must depend on a balance of what is politic or right. In this very matter of public policy we find that the principle has been sometimes applied (for instance) to a covenant in restraint of trade deliberately entered into by a man who afterwards wishes to avoid its enforcement against him, because he says restraint of trade is against public policy. In the old days that used to be strictly so held. But in modern days the Court looks at the whole subject-matter, and bears in mind that, though, on the one hand, it may be contrary to public policy that there should be restraint of trade, on the other hand, it is contrary to public policy that a man should be allowed to evade engagements into which he has entered. In the present case there is a clause which generally is free from any objection. It is found that, in the case of the second marriage of the tenant for life after a divorce has been obtained against him by his first wife, this clause might possibly be an inducement to the husband to seek for a divorce, and would, therefore, be against public policy. But, on the other hand, if he does marry again (and the law allows him to marry again after a divorce) it is his duty to provide for his second wife and his children by her. It seems to me very doubtful, whether, on the balance of considerations, if a divorced husband, exercising the right which the Legislature has given him of marrying again, were to make provision out of his property for his second wife and her family, the making of such a provision would be against public policy. So much on the point of public policy.

With reference to the construction of the resettlement I only wish to say one word. As I understand the argument which has been addressed to us, we are invited to read the power, which it is expressly said Lord Blandford may exercise as often as he shall marry ("the said power of jointuring," it is called), as a general power, and to read the words "appoint to any woman" as if the words had been "appoint on marriage." And then it is said that the intention is, that there should be a power of jointuring limited to the 2500*l.*, and that that power only may be exercised as often as Lord Blandford shall marry. Although that is a construction which one would perhaps not be sorry to adopt, the words are too strong, and we can only construe them as my Lord has done.

ROMER L.J. I agree. With regard to the point of so-called public policy, I need only say that there is nothing whatever contrary to public policy in a settlement providing or contemplating that a tenant for life may validly marry more than once, nor in its providing that, if he does, he may exercise certain powers over the settled property in order to provide for the wife and children of his subsequent marriages. Such a settlement is perfectly valid, and there is nothing in it contrary to public policy. The cases cited have nothing whatever to do with the case now before us.

Another point might possibly have been argued upon the construction of this settlement—namely, that the power of jointuring is limited in this way, that it cannot be exercised in favour of any woman who was not the wife of the tenant for life at the time of his death. That point has not been argued before us, and we start with the assumption that the power is not thus limited, and that the divorced wife of the eighth Duke is entitled to the jointure which was appointed to her by him. That point not being taken, it seems to me clear that upon this settlement nothing can be said against the claim of the second wife. She is clearly, within the words of the resettlement, a woman whom the eighth Duke married, and it is clear that he had power to appoint to her by way of jointure a yearly rentcharge, a sum not exceeding in the whole the sum which he

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has appointed. The words "not exceeding in the whole" clearly point to this, that each woman who was entitled to have the power of jointure exercised in her favour might have limited to her a sum not exceeding the amount mentioned in the settlement.

For these reasons I agree that the appeal must be dismissed and with costs.

Solicitors: *Nicholl, Manisty & Co.; Whitehead, Marshall & Co.*

W. L. C.

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FISHER *v.* BLACK AND WHITE PUBLISHING COMPANY.

[1900 F. 1750.]

Company—Payment of Dividend—"Profits available for Dividend"—Setting apart Reserve Fund—Articles partly excluding Table A—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Sched. I., Table A, clause* 74.

The memorandum of association of a company provided that, as between the holders of the ordinary shares and the holders of the founders' shares, "the profits from time to time available for dividend" should be applicable as follows: (1.) to the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the shares other than the founders' shares; (2.) of the surplus, two-thirds should be applicable to the payment of a further dividend on the shares other than the founders' shares, and the remaining one-third should be applicable to the payment of dividend on the founders' shares.

The articles of association provided (clause 1) that, so far as they did not exclude or modify the regulations contained in Table A in Sched. I. to the Companies Act, 1862, those regulations should, so far as applicable, be deemed to be the regulations of the company. The articles expressly excluded some of the clauses of Table A, but did not expressly exclude clause 74, which provides that "the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends":—

Held, that clause 74 of Table A was not in toto excluded by implication, but that it must be taken to form part of the articles; that "profits available for dividend" meant the net profits after making any deductions which the directors could properly make before declaring a dividend, and that the directors were justified, after paying a dividend of 15 per cent. to

the ordinary shareholders, in setting aside as a reserve fund to meet contingencies so much of the surplus of the profits of a year as they thought fit.

Decision of Kekewich J. reversed.

Per Romer L.J.: Whether the directors could have set aside a reserve fund for the purpose of equalizing dividends, *quære*.

MOTION on behalf of the plaintiff for an interlocutory injunction to restrain the defendant company and their directors from dealing with the profits of the company in the manner proposed by the report of the directors.

The question raised was as to the right of the holders of founders' shares in the company to be paid a dividend out of profits. The capital of the company was 100,000*l*., divided into 9500 ordinary shares of 10*l*. each and 500 founders' shares of 10*l*. each. The plaintiff, who held some founders' shares, claimed a declaration that one-third of the whole profits made by the company in each year and remaining, after a non-cumulative preferential dividend at the rate of 15 per cent. on the amount for the time being paid up on the ordinary shares issued had been provided for, belonged to and ought to be divided between the plaintiff and the other holders of founders' shares in proportion to the number of shares held by them respectively; and an injunction to restrain the company and its directors, &c., from carrying the one-third share of the remaining profits or any part thereof to a reserve fund, and from dealing with the one-third share so as to prejudice or affect the right of the plaintiff and the other holders of founders' shares.

Clause 5 of the company's memorandum of association provided that "as between the holders of the ordinary shares and the holders of the founders' shares the profits from time to time available for dividend shall be applicable as follows: (1.) To the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the capital paid up on the shares other than the founders' shares; (2.) of the surplus, two-thirds shall be applicable to the payment of a further dividend on the capital paid up on the shares other than the founders' shares, and the remaining one-third shall be applicable to the payment of

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dividend on the founders' shares rateably." The articles of association provided (clause 1) that the regulations contained in Table A in the 1st schedule to the Companies Act, 1862, except so far as thereby excluded or modified, should, so far as applicable, be deemed to be the regulations of the company. By clause 11 "the holders of the ordinary shares shall be entitled to be paid out of the profits in each year as a first charge a non-cumulative preferential dividend at the rate of 15 per cent. per annum on the amount for the time being paid up on the ordinary shares held by them respectively." By clause 12, "the surplus profits in each year shall be dealt with in manner following—that is to say, two-thirds shall belong to and be divided between or among the holders of the ordinary shares rateably in proportion to the amount for the time being paid up on the ordinary shares held by them respectively, and the remaining one-third shall belong to and be divided between the holders of the founders' shares in proportion to the number of shares held by them respectively." Some of the clauses of Table A were expressly excluded by the articles, but clauses 72, 73, and 74 were not expressly excluded. Those three clauses are as follows: (72.) "The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." (73.) "No dividend shall be payable except out of the profits arising from the business of the company." (74.) "The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select."

The accounts presented by the directors for the year ending July 31, 1900, shewed that the profits for that year, after allowing for an interim dividend of 2½ per cent. already paid to the ordinary shareholders, amounted to 13,225*l.* 11*s.* 4*d.*, and the directors by their report proposed in the first place to pay a dividend of 12½ per cent. for the whole year to the holders of

the ordinary shares, and then (*a*) to apply 2179*l.* 7*s.*, part of the balance, in writing off a suspense account, and (*b*) to carry over 7000*l.* to a reserve fund, thus leaving the holders of the founders' shares without a dividend.

The plaintiff moved before Kekewich J. on November 30, 1900, for an interlocutory injunction.

Warrington, Q.C., and *E. A. Nepean*, for the plaintiff. The memorandum and articles of association of this company amount to an express direction that profits available for dividend are to be divided in a specified way. The directors' report shews profits for last year, and those profits ought to be divided by them in accordance with clause 5 of the memorandum of association and clauses 11 and 12 of the articles of association. Clause 74 of Table A is inconsistent with the express provisions of the memorandum and articles of association, and ought therefore, by force of clause 1 of the articles of association, to be treated as at least modified, if not altogether excluded.

Renshaw, Q.C., and *Stewart-Smith*, for the company. Clause 74 of Table A governs this case. That clause is not, so far as the present question is concerned, in any way inconsistent with the provisions in the memorandum and articles of association, and is therefore not excluded or modified. The case turns upon the meaning of the words "profits from time to time available for dividend" as used in the memorandum. Those words must mean available for dividend according to law, i.e., according to the constitution of the company, and the discretion conferred on the directors by clause 74 of Table A is an integral and important part of that constitution. Clause 5 of the memorandum was only intended to apply as between the two classes of shareholders, and not to fetter the directors in deciding how much of the earnings of the company are profits properly applicable to yearly dividend. It is, moreover, worthy of notice that some of the clauses of Table A are expressly negatived by these articles of association, but that clause 74 is not expressly negatived.

No reply was called for.

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KEKEWICH J. was of opinion that clause 5 of the memorandum of association was inconsistent with clause 74 of Table A, and that consequently clause 74 was excluded. And his Lordship accordingly granted an interlocutory injunction.

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The company appealed. The appeal was heard on December 12, 1900.

On the hearing of the appeal it was agreed that it should be treated as an appeal against a judgment for the plaintiff at the trial of the action.

Renshaw, Q.C., and *Stewart-Smith*, for the company.
E. A. Nepean (*Warrington, Q.C.* with him), for the plaintiff.
The arguments adduced in the Court below were repeated.

RIGBY L.J. The question for decision arises upon the construction of the memorandum and articles of association of the company, and in particular of clause 5 of the memorandum and clauses 11 and 12 of the articles, and of clause 74 of Table A, which Table, except so far as it is excluded or modified, forms part of the articles. [His Lordship read clause 5 of the memorandum, and continued :—]

Let us consider first what is meant by "the profits from time to time available for dividend." It seems to me that, if that meant exactly the same thing as "the profits," it would have been useless to introduce the qualifying words (which, I think, bear an important part in this matter) "from time to time available for dividend." It has been argued that all profits are included, and that regard must be had to clause 73 of Table A (which forms part of the articles), and that there you find a limitation, namely, that dividends are to be paid out of profits. I do not think that we can properly be called upon to separate one part of profits from another. The profits mentioned in clause 73 are profits "arising from the business of the company," and that clause gives no assistance in endeavouring to ascertain what are "profits from time to time available for dividend."

Clauses 11 and 12 of the articles have been referred to, and they no doubt require consideration. [His Lordship read clauses 11 and 12, and continued :—]

Those clauses are clearly dealing with the same subject-matter as is dealt with in clause 5 of the memorandum. It would be idle, I think, to suppose that there was a deliberate intention to lay down a rule for the division of profits different from that contained in clause 5 of the memorandum. I should rather assume, and I do so without much difficulty, that it was intended to lay down the ordinary rule, and that when it is provided that a dividend of a specified amount shall be paid "out of the profits," that did not mean that it should be paid out of any profits whatsoever, but only out of those profits that were available for dividend. As has already been pointed out by my brother Romer, the language of clause 11 and that of clause 12, though not quite so distinctly, points to—not an aliquot share of gross profits—but a dividend, which is to be a first charge, and a non-cumulative one, to be paid out of the profits, and, in so far as that first charge cannot be paid out of the profits, it must fail. If, for instance, the profits were only 5 per cent., the first dividend of 15 per cent. could not be paid. I think that clauses 11 and 12 must be construed as meaning, paid after the fashion and in the manner in which a dividend may be paid.

So far we have not arrived at any conclusion as to the precise meaning of the words "profits available for dividend," but there is no difficulty, I think, in surmising what they must mean. They must mean profits which are properly applicable to the payment of dividends; and when we turn to clause 74 of Table A we find a provision, and, so far as I know, the only provision, for a limitation of the profits which are applicable and can properly be applied to the payment of dividends, for we find there that "the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they may think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company." It seems to me that one of the duties (perhaps the very first

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duty) which the directors have to undertake, when they formulate a statement of account of the profits for the period with which they are dealing, is to determine what sum they shall set apart for a reserve fund, and when they have set it apart they must invest it "upon such securities as they may select," and from the moment when they have set apart the reserve fund it is no longer "profit available for dividend."

Then clause 5 does not in any way deal with what they set apart as a reserve fund. They have power to set it apart, and as prudent men they ought to do so, to meet contingencies. They ought to apply their minds to determine whether a reserve fund shall or shall not be created, and, when once they have determined to create it, clause 5 of the memorandum, and clauses 11 and 12 of the articles, have nothing whatever to do with the matter. The directors must divide the sum which remains after deducting the amount carried to a reserve fund. There may possibly be other sums which ought to be set apart before a dividend is paid: if so, those sums must be set apart too, and it is only when this has been done that you can estimate the profits which are available for dividend.

VAUGHAN WILLIAMS L.J. I agree. I do not think this is an easy case to decide; and, moreover, I think it is extremely probable that the question which has been raised upon the construction of this particular memorandum and these particular articles is one which may affect many other companies, for one knows that such forms are in common use. But, although I think the point is a difficult one, I agree that it is not necessary to take further time to consider it, for the case has been very well argued on both sides, and these cases are probably decided better when the arguments are fresh in our minds than after deferred consideration.

The question which we have to decide is really what is the meaning of the words "the profits from time to time available for dividend" in clause 5 of the memorandum. Counsel on both sides have invited us to treat clause 5 as ambiguous and to construe it in the light of the articles, and I propose to do so. I think that the words "profits from time to time

available for dividend" in clause 5 mean the net profits after deducting all proper appropriations made by the directors. I do not think the expression can mean the net profit balance as shewn by the profit and loss account, nor did any one contend that it does. If it does not mean that, it seems to me that there is no resting place short of saying that it is the net profit after deducting all sums properly appropriated by the directors before they arrive at the sum out of which the dividends are to be paid. If they had the power to appropriate, and they chose to appropriate, a portion of the profit balance shewn by the profit and loss account to the replacement of capital which had been expended for revenue purposes, no one denies that they could do that, and, on the other hand, no one can say that they are under an obligation to do it. It is a matter within their discretion so to appropriate the profit balance. They might if they chose apply the whole profit balance to dividend without making any such appropriation for the purpose of replacement of capital. That being so, the question arises whether this appropriation of part of the profit balance to the formation of a reserve fund to meet contingencies is a proper appropriation by the directors, and I think it is.

Every one, I think, agrees that it would be a proper appropriation if clause 74 of Table A is in force. Clause 1 of the articles provides that "In so far as these articles do not exclude or modify" the regulations contained in Table A, those regulations "shall, so far as the same are applicable, be deemed to be the regulations of the company." Then it is expressly stated that some specified clauses of Table A shall not apply. Clause 74 is not expressly excluded, and it can be excluded only if it is inconsistent with some express provision in the memorandum or the articles. I can see no such inconsistency. On the contrary, if I had to construe clause 5 of the memorandum without the assistance of the contemporaneous articles, I could not say that there is anything in that clause inconsistent with the power of the directors to set aside out of the profits of the company such a sum as they may think proper as a reserve fund. But if I must turn to the articles to construe the memorandum (a thing which I always do with very great hesitation), I still think that clause 74 of Table A is not

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excluded, and, if it is not, but is to be treated as written into the special articles, it is an a fortiori conclusion that there is nothing in clause 5 of the memorandum to prevent the directors from setting aside out of the profits of the company such a sum as they may think proper as a reserve fund. For, in my opinion, the word "profits" in clause 5 means the profits after deducting all sums properly appropriated by the directors out of the profit balance shewn in the profit and loss account.

I desire to add that I always regret to have to come to a conclusion at which possibly business people would not arrive, and I confess that I have had some doubt whether business people might not read "profits" in clause 5 of the memorandum in a different sense from that in which I am reading it. Indeed, the wording of the report of the directors looks as though they were not using the word "profit" in the way in which I am reading it. It looks as if the directors, who are creating this reserve fund, thought that the "profits available for dividend" were the whole sum of 13,225*l.* 11*s.* 4*d.* But, whatever they may have thought, it is the province of the Court to determine what that expression means; and in my view it means, not the whole of that sum, but that sum less so much of it as the directors have within their powers properly set aside as a reserve fund to meet future contingencies.

ROMER L.J. The point involved is, I think, a somewhat difficult one, but it has been very well argued on both sides, and I cannot say that I have felt much difficulty in coming to a conclusion upon it. I think the arguments on behalf of the respondent could not have been better put than they were by Mr. Nepean. As we are differing from my brother Kekewich, I think it right to state my reasons in my own language.

In my opinion the words "available for dividend" in clause 5 of the memorandum, following the word "profits," were intended in some shape or form to modify the word "profits." I think the phrase "profits from time to time available for dividend" means profits which, after making all proper deductions, remain for the purpose of paying dividends. One may arrive at this conclusion in another way. What is the period of time which you must consider when you have to

ascertain within clause 5 of the memorandum what are the "profits available for dividend"? I think the time to be considered is after you have already properly ascertained the profits applicable for the payment of dividend, and not any prior time. Is there then any difficulty in the way of that construction by reason of the wording of clauses 11 and 12 of the articles? I cannot see that there is. In my view the word "profits" in clauses 11 and 12 must be taken to mean the same profits as are referred to in the memorandum of association—that is, "profits available for dividend," just as if those words had been repeated in those clauses. This is borne out by the fact that the payments mentioned in clauses 11 and 12 are described as payments of dividends.

Then, with regard to Table A this undoubtedly is clear—that clauses 72, 73, and 74 are not expressly excluded, and it must be borne in mind that when any clauses of Table A are to be expressly excluded you find those clauses are specified in the articles, and it is, I think, a fair deduction that the framers of the memorandum and articles must have had clauses 72, 73, and 74 in their minds, and did not think it necessary expressly to exclude them. In my opinion those clauses ought certainly to be considered as included, unless there is some grave reason why they should be excluded. I can see no such reason; and, on the other hand, I can see great difficulty in the way of holding that they should be excluded, and especially clause 74. In my opinion clause 74 is included in these articles.

But it is right to say that as at present advised I think that clause 74 is modified to some extent, for in my view it could not be used for the purpose of creating a reserve fund to be applied in equalizing dividends. That is my present view, though I do not express any concluded opinion about it, because the question is not now before us. But I point that out because otherwise it might be supposed that clause 74 could be used so as to cause what might be an injustice as between the owners of the founders' shares and the owners of the ordinary shares. I agree that the appeal ought to be allowed.

Solicitors: *Dubois & Williams; W. Fisher.*

W. L. C.

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Nov. 9.

RANDT GOLD MINING COMPANY, LIMITED *v.* WAINWRIGHT.

[1900 R. 1793.]

Company — Voting — Disqualification — Forfeiture of Shares—Purchaser of Forfeited Shares Disqualified from Voting whilst Calls remain Due from Original Holder.

By the articles of association of a company it was provided that after the forfeiture of shares the directors of the company should be entitled to recover from the shareholder calls and other sums due in respect of the forfeited shares, and that no member should be entitled to vote whilst any calls or other sums should be due and payable to the company in respect of the shares of such member.

Shares were forfeited for non-payment of calls, and resold by the company to a purchaser, to whom a certificate was issued stating that he was to be deemed to be the holder of the shares discharged from all calls due:—

Held, that the purchaser of the shares was not entitled to vote whilst any calls or other sums remained due and payable to the company from the original holder of the shares.

THE plaintiff company was incorporated in 1895 with a capital of 80,000*l.*, which was subsequently divided into 320,000 shares of 5*s.* each.

The articles of association of the company, after the usual clauses as to giving notice requiring payment of overdue calls and expenses, contained the following:—

"Art. 15. If the requisitions of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter, before payment of all calls or instalments, interest and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect.

"Art. 16. Any shares so forfeited shall be deemed to be the property of the company, and the directors may sell, reallot, or otherwise dispose of the same in such manner as they think fit. Any member whose shares have been forfeited shall notwithstanding be liable to pay, and shall forthwith pay to the company all calls, instalments, interest and expenses owing

upon or in respect of such shares at the time of the forfeiture, with interest thereon until payment at the rate of 10*l.* per cent. per annum, and the directors may enforce the payment of such money, or any part thereof, if they think fit, but shall not be under any obligation so to do."

Art. 67 was as follows: "No member shall be entitled to be present or to vote on any question, either personally or by proxy, or as proxy for another member, at any general meeting, or upon a poll, or be reckoned in a quorum, whilst any call or other sum shall be due and payable to the company in respect of any of the shares of such member."

Forty-one thousand three hundred shares in the company were issued to the African Gold Properties, Limited. The full amount payable on these shares was duly called up.

The African Gold Properties, Limited, paid calls to the amount of 6933*l.* 1*s.* upon the 41,300 shares, but failed to pay further calls, and went into liquidation. At the time of the liquidation there remained due from them for calls the sum of 3391*l.* 19*s.*

The plaintiff company then forfeited the shares, and sold and issued them to the New Balkis Eersteling, Limited, for 150*l.*

A certificate for the shares was issued by the plaintiff company in the following form: "The New Balkis Eersteling, Limited, is the holder of the shares in question, upon which the sum of 3*s.* 4*d.* per share has been paid; the remaining 1*s.* 8*d.* per share has been called up, and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited, and the New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof."

At a general meeting of the plaintiff company, held on August 8, 1900, a resolution was proposed that the company should be wound up voluntarily, and the defendant Wainwright appointed liquidator. This resolution was declared to be carried. A poll was demanded, and at an adjourned meeting the result of the poll was declared as 90,077 votes for and 71,080 votes against the resolution, and the resolution was declared carried as an ordinary resolution.

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Another meeting was held on October 17 to consider a resolution in the same terms. This was declared carried, and, a poll being demanded, was actually carried by 82,228 for to 58,560 against the resolution.

In each case the New Balkis Company voted in respect of their 41,300 shares, and in the absence of their votes the majority would have been against the resolution.

This was an action by the company against Wainwright and the directors for an injunction to restrain Wainwright from acting as liquidator, on the ground that the resolutions for voluntary winding-up and for his appointment were not validly passed.

A question was raised whether the resolutions were sufficient, even if all the votes were valid, but in the view taken by the Court it became unnecessary to decide the point.

It was stated that subsequently to the sale of the forfeited shares the plaintiff company had recovered money from the African Gold Properties, Limited, pursuant to art. 16.

Renshaw, Q.C., and *Clauson*, for the plaintiff company. At the time when these shares were issued to the New Balkis Company there was, and there now still is, a sum of money due and payable to the company in respect of the shares; and, therefore, by art. 67, the New Balkis Company, as members of the plaintiff company holding the shares, were absolutely disqualified from voting. It was not competent for the directors, as they attempted to do by the terms of the certificate issued by them, to relieve the purchasers of the forfeited shares from liability to pay calls, for that would have been in effect a reduction of the capital of the company in an illegal manner.

Sheldon, for the defendants. Under the circumstances of this case there is no sum of money due and payable to the plaintiff company in respect of these shares within the meaning of art. 67. By the forfeiture of the shares the liability to pay calls was extinguished: *Stocken's Case* (1), where Lord Cairns intimated that "the mere fact of a duly authorized forfeiture of shares, without anything in the articles defining the effect

(1) (1868) L. R. 3 Ch. 412, 415.

of forfeiture, would of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings must . . . . be on the footing that the person sued was a shareholder in the company; and if his interest in the company had been destroyed," it was by no means clear that the action could be maintained. The question in that case, no doubt, turned upon the construction of the particular articles; but there is no substantial difference between the articles in that case and those in the present case. The liability of the African Gold Properties, Limited, under art. 16 is a new and personal liability entirely distinct from the liability of members to pay calls. The latter liability is gone; the former continues. The disqualification imposed by art. 67 is of a personal character; and inasmuch as the New Balkis Company cannot be compelled to pay calls, there is no sum due in respect of these shares so as to give rise to a disqualification under the article.

KEKEWICH J. The point suggested by Mr. Renshaw that the forfeiture of shares and their reissue free from liability to calls is an unauthorized reduction of capital is one deserving further consideration. But I pass that over because there is a further point upon which I can decide the case. Arts. 15 and 16 provide for the forfeiture of shares and their sale when forfeited. It seems that the shares in question were properly forfeited, the directors had power to sell them, and I assume that the price for which they sold them was a proper one.

It seems that in general a forfeiture so carried out extinguishes all the rights and liabilities of the original shareholder. In the case which was cited, Cairns L.J. held that no action for calls could be brought after forfeiture. He held that all rights were extinguished because the holder of the forfeited shares had ceased to be a shareholder. If, therefore, the articles stopped with art. 15, calls could not be sued for, and there would be no moneys payable in respect of these shares. But art. 16 provides that the calls shall still be payable. [His Lordship read that article.] It is quite true that the liability imposed by that article is a new one. The company can no

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longer sue for calls as calls, but must sue in respect of the new liability imposed by art. 16. But the result is that there is still something due. I cannot see any reason why the words "any call or other sum . . . . due or payable to the company in respect of any share" in art. 67 should not include the sums payable under art. 16. The sums originally due as calls are still due under the new liability, and they are certainly due in respect of the shares held by the Balkis Company as transferees of the forfeited shares. I am of opinion that the votes of the Balkis Company were wrongly counted. If that is so, it is admitted that the resolutions were not carried. I must therefore grant an injunction restraining the company and the liquidator from acting upon the resolutions.

Solicitors: *Hollams, Sons, Coward & Hawksley; Sanderson, Adkin & Lee.*

C. C. M. D.

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BERRY *v.* HALIFAX COMMERCIAL BANKING COMPANY, LIMITED.

[1900 B. 627.]

Banker and Customer—Closing Account—Mortgage to secure Account Current—Power of Sale—Notice by Mortgagor to Bank of Appointment of a Trustee for his Creditors.

A customer of a bank mortgaged to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (among other events) default should be made in payment of the balance owing for the space of one calendar month after the account current had been closed.

On November 9, 1899, the customer wrote to the bank manager: "There was a meeting of creditors yesterday . . . . They agreed to accept all the assets I had. I gave them to understand that I was insured . . . . and that you held the policy . . . . as security for your account. . . . . There was a trustee appointed. Trusting every one will get 20*s.* in the pound," &c.

On December 18 the bank sold the policy under the power in the mortgage:—

Held, that the letter amounted to a closing of the account, and that the bank were justified in realizing their security.

THIS was an action to have an account taken of what (if anything) was due on a mortgage dated July 20, 1889, made

between David Smithies of the one part and the defendant bank of the other part, redemption of the property comprised therein, and damages for an alleged wrongful sale of a policy of assurance comprised in the mortgage.

By the mortgage of July 20, 1889, Smithies assigned to the bank a policy of assurance on his life for 1000*l.*, and the moneys payable thereunder, to secure his banking account with the bank. And the mortgagor covenanted with the bank that he would pay to the bank all sums of money which then were or should from time to time thereafter become owing from him to the bank in account current with the bank, or upon any cheques, promissory notes, or bills of exchange drawn, accepted, or indorsed by the mortgagor, or which should have been paid for his credit, when thereunto required by the bank, and if at the time when the said account current should be closed by the death of the mortgagor, or otherwise, a balance thereon or any other moneys intended to be secured thereby should be owing to the bank, the mortgagor would forthwith pay such balance, or other moneys, with interest after the rate of 5*l.* per centum per annum. And the mortgage provided that the statutory power of sale should be exercisable by the bank if default should be made in payment of the balance owing on the said account current, or other the moneys due from the mortgagor, or some part thereof, for the space of one calendar month after the said account current had been closed, or after a notice in writing demanding such payment should have been given by or on behalf of the bank to the mortgagor, or left for him at his usual or last known place of abode. Smithies also deposited with the bank by way of collateral security certain shares in a limited company.

Smithies early in the year 1899 was in debt to the bank in a sum in excess of the limit which the bank was willing to allow, and he was by letters from the bank manager from the month of February onwards constantly pressed to reduce the amount of his indebtedness, and warned against the possibility of his cheques being dishonoured. In particular, on August 29 the manager wrote inclosing the pass-book made up to date, and

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saying, "I am much surprised to find the balance upwards of 550*l*., and that you have sent nothing whatever to credit for upwards of a month. I must request your immediate attention to this, and I hope to receive a good amount during the week in absolute reduction. When may I expect a settlement of the accounts as promised?"

Smithies had been expecting to sell his business for a sum more than sufficient to pay his debt, but he was disappointed in this expectation.

On October 30, 1899, the manager wrote that the bank would not sit still much longer, and he should be glad to know Smithies' proposals and prospects as to payment of the balance due.

On November 9, 1899, Smithies wrote to the manager as follows: "There was a meeting of creditors yesterday . . . . I was not aware but you had a circular calling the meeting. They agreed to accept all the assets I had. I gave them to understand that I was insured in the Royal and that you held the policy and 300*l*. worth of shares as security for your account. . . . . There was a trustee appointed yesterday, but I do not remember the name, he will be writing to you very soon I expect as I gave your address. Trusting every one will get 20*s*. in the pound," &c.

By a deed of November 17, 1899, Smithies assured all his real and personal estate to the plaintiff on trust for the benefit of his creditors. This deed was duly registered in pursuance of the Deeds of Arrangement Act, 1887, and notice of it was given to the bank on November 28, 1899. On November 17, 1899, there was a balance of 566*l*. 16*s*. 4*d*. due from Smithies to the bank. On December 18, 1899, the bank, under the powers of the mortgage of July 20, 1889, sold the policy for the sum of 350*l*.

Smithies died on January 6, 1900. The plaintiff brought this action, alleging that the power of sale had not arisen, on the ground that the account had not been closed nor a demand in writing for the money made one calendar month before the sale.

Warrington, Q.C., and *H. Greenwood*, for the plaintiff. The question is whether either of the events on which the power of sale arose had happened before December 18, 1899. The correspondence does not shew either a demand or the closing of the account. The closing of an account is a putting an end to the agency of the bank. It does not come about automatically. Something must be done. Some notice must be given to the customer. There was none here. In *Buckingham & Co.* v. *London and Midland Bank* (1) the customer recovered damages because his account was closed without reasonable notice of the intention to do so. Assuming that the policy has been sold, the plaintiff is entitled to substantial damages. If it has not, he is entitled to redeem; and in any case he is entitled to redeem the shares.

The statutory power of sale is conferred by s. 19 of the Conveyancing and Law of Property Act, 1881, and s. 20 imposes restrictions on its exercise. Those restrictions are modified by the special provisions of this mortgage deed.

Renshaw, Q.C., and *O. L. Clare*, for the defendant bank. The letter of October 30, when read in connection with that of August 29, meant that the bank would close the account, or enforce their security. That was notice of intention to close the account. The account was a debit account. The considerations in that case are not the same as when the account is in credit. A bank is not bound to continue a debit account. The dishonouring of cheques is in itself the closing of an account. That may be deduced from *Buckingham & Co.* v. *London and Midland Bank*. (1) It was clear before October that the account was not going to be put in credit.

The letter of November 9 amounted to a closing of the account—it gave notice of the appointment of a trustee. A banking account closes automatically on an assignment of the customer's property. If the letter was not a closing of the account, the execution of the deed of November 17 was. The bank had not actual notice of that deed a month before the sale, but they had notice on November 10 of the intention to execute it. The execution of it was only the legal completion of what

(1) (1895) 12 Times L. R. 70.

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had been previously arranged. Notice of insolvency by one party to a contract to the other party entitles that other party to assume that the insolvent intends to abandon the contract: see Brett J. in *Morgan* v. *Bain* (1), referring to the words of Mellish L.J. in *Ex parte Chalmers*. (2) That was not exactly the same case as this, but it throws some light on the effect of a statement of inability to pay. The letter of November 9 was, in effect, a notice that Smithies was not able to pay the bank or any one else, and amounted to an act of bankruptcy under s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883. That was a closing of the account of which the bank had notice on November 10. They could not have honoured cheques after that date except at their own risk.

In closing an account, it is not necessary that the account should be actually made up in figures in ink or pencil. It is sufficient if either the bank or the customer says that there are to be no more dealings with the account.

The pass-book was made up to November 17. That was the result of the closing of the account.

Warrington, Q.C., in reply.

[KEKEWICH J. The letter of November 9 seems to be the strongest thing against you.]

That was not a notice of an assignment. It was only notice of an intention. The effect of a notice of inability to pay is different according as the account is in credit or in debit. If the account had been in credit, it might have operated as a closing of the account, as the bankers could not afterwards have honoured cheques; but if, as is the case here, the account is in debit, there being no balance to pass by the assignment, the statement only tells the bank that which it knows already, and makes no difference in the position.

Morgan v. *Bain* (1) does not apply in this case. That was a case of a beneficial contract. Dishonouring a cheque is not necessarily the closing of an account. An account may be in debit, and the cheque declined on that ground, but it may be afterwards put in credit, and the cheque paid.

It was for the bank, not for the customer, to close the

(1) (1874) L. R. 10 C. P. 15, 26. (2) (1873) L. R. 8 Ch. 289, 294.

account when it was in debit, and the letter of November 9 cannot be taken as closing the account.

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KEKEWICH J: This case is of some importance to bankers and their customers. The mortgage recognises the statutory power of sale, and provides that it shall be exercisable in certain events—that is to say, notwithstanding the restrictions imposed by s. 20 of the Conveyancing Act, 1881, upon the exercise of a power of sale, this power is to be exercisable in certain events, and the question is whether those events have happened. I have to consider whether, within the meaning of the deed, the account current has been closed, or a demand in writing has been made, and one calendar month has elapsed before the exercise of the power of sale after either of these events.

There is no occasion to inquire what is the meaning of "after notice in writing demanding payment shall have been given." It is, however, important to ascertain, if the deed enables one to do so, what is meant by the account current being closed, and some light is thrown upon that by the covenant to pay. The covenant is for payment forthwith of any balance which shall be owing "at the time when the account current shall be closed by the death of the mortgagor, or otherwise." It seems to me that the words "by the death of the mortgagor" can be used to shew what is the meaning of the words "or otherwise," which are exceedingly large, and require interpretation. It is obvious that they cannot be construed here by the rule ejusdem generis, as no event could be put side by side with the death of the mortgagor. I think that the reference to closing "by the death of the mortgagor" disposes of the argument adduced on behalf of the plaintiff that it must be by some act necessarily communicated by the mortgagee to the mortgagor. I am far from intending to hold that in a large number of cases of closing an account—probably the large majority—it would not be necessary to give some notice, but I think that that phrase goes to shew that the parties contemplated and intended that an account might be closed in other ways than by a simple closing of the account on the part of the

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bank, by drawing a line, balancing the account, and communicating that to the mortgagor. That leaves it to me to consider what, according to the course of dealing, according to mercantile custom, and according to special contract, would be a closing of the account. [His Lordship referred to the facts, and with regard to the correspondence between the parties said that though there was pressure by the bank, sometimes severe, he could not find anywhere a distinct peremptory intimation that the account would be closed, either in so many words, or to that effect, if something was not done by the customer before a certain date. He continued :—]

The letter of October 30 is in rather different terms from the others, but it seems to me to be couched in really the same language, and written really on the same lines. It does not say that the bank will not sit still any longer, but that it will not sit still much longer. There is still a locus pœnitentiæ left open to the debtor; and then, instead of saying that he "must have a proposal by a certain date," or "unless you pay in a substantial sum by a certain date the account will be closed," or anything of that kind, the manager says, "I shall be glad to know your proposals and prospects as to payment of the balance due." It is no doubt, though courteous, a firm letter, but it has not that peremptory character which one must insist upon as a "closing of the account." It is said that that must be read with the letter of August 29, 1899. That is so, but that is a letter of precisely the same character, though in different language.

It was said that the execution of the deed of November 17 alone was a closing of the account. If no sufficient notice had been given of it before the time limited for the exercise of the power of sale, I do not see how the deed in itself could operate as a closing of the account. There must be some communication between the parties. I now come to what I think did amount to a closing of the account under the mortgage, namely, the letter of November 9. The bank, of course, were included in the persons who it was hoped would get 20*s.* in the pound. The bank were secured creditors, and the writer refers to the security which they had. He addresses them as secured

creditors, and as regards that I do not see the importance of the fact that the account was in debit and not in credit. The bank held security, and Smithies' interest in that security had passed to his trustee. If that letter means anything, it surely means that there is an end of the transactions between the parties. It comes to this: "Our transactions up to the present time have been of this character. I have been drawing on my current account in excess of the moneys which I have from time to time paid in, but you have held security and you hold security still: those are the relative positions. That has come to an end. I have now assigned everything including the security, subject to your charge, to a gentleman whose name I forget; the creditors have accepted what I can give them as a discharge of my debts to them, and the result is that you and I now have severed our connection of banker and customer." I cannot conceive that this letter, if it was not intended to mean that, was intended to mean anything at all.

Mr. Renshaw has called my attention to some remarks of the late Lord Esher, when Brett J., quoting with approval some other observations of Mellish L.J. I agree that those remarks were not made in a case which directly bears upon this case, but they are useful as illustrating what a person must be taken to have intended by a letter. Clearly, as I said before, the relation of banker and customer here was at an end. There was no relation of banker and customer in the ordinary sense of an unsecured account, where the customer paid in money and drew it out by cheques. It was a peculiar relation constituted by that deed, and that obviously had come to an end. It seems to me that the mortgagor closed the account himself, or, if he did not actually close it, he recognised that it must be closed. There was nothing more to be done. It was said that the bank after that might have honoured his cheques. They might, of course, but one must not suppose such a foolish thing as that. It is absurd to suppose that after that letter they would have honoured his cheques, and that is really the only way in which the account could be kept open. It seems to me that on November 9 there was an end of the whole transaction and the power of sale arose, or was exercisable within a month

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of that date. It was not exercised until December 18, and I think that on that day the bank were justified in realizing their security, and that the plaintiff, as representing the mortgagor, has no case against them as to that.

The plaintiff is, of course, entitled to redeem the shares.

Solicitors: *E. C. Rawlings & Butt; Jaques & Co., for Godfrey Rhodes & Evans, Halifax.*

C. C. M. D.

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Dec. 5.

BAGOT PNEUMATIC TYRE COMPANY *v.* CLIPPER PNEUMATIC TYRE COMPANY.

[1899 B. 4956.]

Company—Contract—Contract on behalf of intended Company—Ratification—Privity of Contract—New Contract—Patent—Licence—Burden attaching to Property—Right of Action.

By an agreement of March 3, 1897, made between the plaintiff company and P., the plaintiff company agreed to grant to P. an exclusive licence to use a patent in consideration of an annual payment to be made to the plaintiff company by a company in the course of formation by P., and on March 4 the licence was granted to P., and was expressed to be in consideration of the agreement and the payment therein agreed upon. By an agreement of March 5 P. agreed to sell to a trustee for the intended company (which subsequently became the defendant company) the agreement of March 3 and the licence, and by an agreement of April 8, under the seal of the defendant company, the agreement of March 5 was adopted by that company. The defendant company acted in the belief that it was bound to the plaintiff company to perform the obligations of the agreement of March 3. In an action by the plaintiff company against the defendant company to restrain an alleged breach of that agreement:—

Held (1.), following *In re Northumberland Avenue Hotel Co.*, (1886) 33 Ch. D. 16, and distinguishing *Howard* v. *Patent Ivory Manufacturing Co.*, (1888) 38 Ch. D. 156, that the Court ought not to infer a contract between the plaintiff company and the defendant company, and that there was no privity of contract between them; (2.) distinguishing *Werderman* v. *Société Générale d'Électricité*, (1881) 19 Ch. D. 246, that the obligations imposed by the agreement of March 3 were not a burden attaching to the licence itself in the hands of any persons taking with notice:

Held, therefore, that the plaintiff company had no right of action.

THIS action was brought by the Bagot Pneumatic Tyre Company, Limited, against the Clipper Pneumatic Tyre

Company, Limited, to restrain an alleged violation of an agreement dated March 3, 1897.

This agreement was made between the plaintiffs of the one part, and Thomas Couchman Phelps of the other part, and after reciting that the plaintiffs were entitled to certain patents therein specified, it was thereby agreed that the plaintiffs should grant to Phelps, or to the company thereinafter mentioned, an exclusive licence in the form specified in the schedule to the agreement, in consideration (after providing for a cumulative preference dividend of a fixed amount to the shareholders of a company in the course of formation by Phelps, and for the setting aside of a reserve fund) of certain annual payments to be made by the company to the plaintiffs out of the remaining profits available for dividend.

On March 4, 1897, the plaintiffs granted to Phelps a licence in the specified form. This licence, after reciting the fact that the agreement of March 3, 1897, had been entered into, was expressed to be made in consideration of the said agreement and of the payment therein agreed to be made by the licensee to the licensors, and it contained a covenant by the licensee not to assign the licence without the consent of the licensors except to the intended company.

By an agreement dated March 5, 1897, and made between Phelps of the one part and Ernest Piercy as trustee for the intended company of the other part, Phelps agreed to sell to Piercy as such trustee as aforesaid (inter alia) the said agreement and exclusive licence.

The intended company was registered on March 8, 1897, and was the defendant company. By an agreement dated April 8, 1897, and made between Phelps, Piercy, and the defendant company under the seal of the latter, the agreement of March 5, 1897, was adopted by the defendant company subject to a modification not material to be stated.

The licence, though used to a certain extent by the defendants, was never actually assigned to them by Phelps.

On two occasions, namely, in December, 1898, and October, 1899, the defendants sent to the plaintiffs certain balance-sheets upon the supposition that they were bound to the

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plaintiffs to perform the obligations of the agreement of March 3, 1897; and that this was the view entertained by the defendants appeared also from the correspondence which passed between the two companies and from entries in the defendants' minute-book.

The defendants pleaded by their defence that the statement of claim disclosed no cause of action by the plaintiffs against the defendants.

This case is reported only as to the plaintiffs' right of action.

Warrington, Q.C., and *E. F. Spence*, for the plaintiffs. The proper inference from the evidence is that the defendants have entered into an agreement with the plaintiffs in the same terms as the agreement with Phelps. *In re Northumberland Avenue Hotel Co.* (1) is distinguishable, because there there was no contract at all under the seal of the company. That case was discussed and distinguished by Kay J. in *Howard* v. *Patent Ivory Manufacturing Co.* (2) There an agreement had been entered into between one Jordan and a trustee for an intended company, which became the defendant company in that case, and a statement was made by the directors in Jordan's presence that they adopted the previous agreement subject to certain modifications, and from that evidence alone the Court inferred that a contract was entered into between Jordan and the company to the effect of the previous agreement as subsequently modified. This case is within the principle of that decision, and is not within *In re Northumberland Avenue Hotel Co.* (1) Here there is an agreement between Phelps and the defendants under the seal of the latter to carry out the agreement with the plaintiffs, and the only question is, who is the person to sue—Phelps or the plaintiffs? No doubt the original contract (of April 8) was with Phelps, but it is to perform obligations entered into with the plaintiffs, and the defendants subsequently look upon the plaintiffs as the persons entitled to the benefit of the contract. The plaintiffs' right to sue may be arrived at in two ways: (1.) by inferring that the contract between the defendants and Phelps was intended by

(1) 33 Ch. D. 16. (2) 38 Ch. D. 156.

the defendants, as shewn by their acts, to be a contract between them and the plaintiffs; (2.) by regarding Phelps, as he was in fact regarded by the defendants, as a trustee of the obligations of the contract for the plaintiffs. Lastly, the plaintiffs are entitled to sue upon a wholly distinct ground. The defendants having become possessed of the right in equity to use the plaintiffs' patents, and having notice of the obligations attached to that right, they are bound to perform those obligations, and can be sued by the plaintiffs for the non-performance of them: *Werderman* v. *Société Générale d'Électricité*. (1)

Neville, Q.C., and *Sargant*, for the defendants. The defendants have entered into no contract with the plaintiffs. It is said that there is evidence to shew that there has been a new contract entered into between the plaintiffs and the defendants in the terms of the original contract, but that is negatived by *In re Northumberland Avenue Hotel Co.* (2), and, as was pointed out in that case, the fact that the defendants thought themselves bound by the existing contract shews that they did not intend to make a new contract. *Howard* v. *Patent Ivory Manufacturing Co.* (3) is distinguishable, because Jordan took an active part in all the proceedings of the directors. Then it was said that Phelps was a trustee of the obligations of the contract for the plaintiffs; but Phelps could not be the agent of the plaintiffs, for he was a purchaser from them. Then *Werderman* v. *Société Générale d'Électricité* (1) was relied on. The ground of that decision was that a special property only passed to the assignee, that special property involving certain conditions. The Court of Appeal decided, not that there was any personal obligation on the company in that case, but that the obligation was a burden attaching to the licence in the hands of any person taking with notice. It is analogous to the principle on which the assignee of a lease with notice of restrictions upon the use of the property is bound to comply with those restrictions. Here the defendants are not assignees of the licence, and there is not between the

(1) 19 Ch. D. 246. (2) 33 Ch. D. 16.
(3) 38 Ch. D. 156.

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defendants and the grantors, the plaintiffs, any such relation as to bring the doctrine of that case into play. Further, the conditions are not here made conditions of the licence itself. The plaintiffs have deliberately chosen to cut up the conditions into two parts.

Spence, in reply. The agreement of March 3 is referred to in the licence, and the defendants took the licence with knowledge of the burden attaching to it. They therefore cannot work the licence without fulfilling the conditions of the licence.

KEKEWICH J. The first point made by the defendants is that the plaintiffs have no right of action. If that is decided in favour of the defendants it is not necessary to go into the other questions. The defendants have entered into no direct contract with the plaintiffs. It is not suggested that there is any direct privity of contract; but the plaintiffs say that they are entitled to sue by reason either of a contract inferred (which is a separate point), or by reason of some contract not inferred from the facts, but to be somehow imported into the documents, although not there expressed. I must deal with these two points separately.

The first document is that of March 3, 1897, whereby the plaintiffs agreed to grant to one Phelps a licence, the terms of which are set out in the schedule, and he, on the other hand, entered into certain contracts with the plaintiffs. It appears on the face of the agreement that Phelps was not buying for his own benefit, or agreeing to take the licence for his own benefit, but was intending to do it on behalf of a company intended to be formed. The consideration therefore, as frequently happens in these cases, was not to be paid by Phelps personally, but was to be provided by the company, who it was supposed would put themselves into Phelps's position, and, by direct contract or otherwise, become bound to the plaintiffs and become responsible to them for the performance of the agreement. It matters not for the moment what the obligations under the agreement were; it is enough to say that there was to be a payment by the company of a certain sum after setting aside other sums for dividend.

The next step is that Phelps enters into an agreement with one Ernest Piercy. That is the agreement of March 5, 1897. Again, Piercy is not a person buying on his own account. He is really only the representative of the company. The company was not then formed, but it was near incorporation, and by an agreement of April 8, a few weeks later, the present defendants, who were the company contemplated as intended then to be formed and intended to take over this property, adopted the agreement, so that they became so far bound that the agreement by Piercy became an agreement entered into by them. There may be a question whether they could ratify an agreement which was made at a time when they were not in existence; but I pass that over, and I consider that on April 8 they became bound to Phelps. But, assuming that, it carries us a very little way on towards the position that the defendants are bound to the plaintiffs, with whom they have entered into no contract whatever. In my opinion the facts, stated as I have stated them, bring this case directly within the authority of *In re Northumberland Avenue Hotel Co.* (1), which was decided fourteen years ago, and has been accepted ever since as expounding the settled doctrines of the Court. That case went before Chitty J. and the Court of Appeal, and it was decided on the ground that there was no right of action except by privity of contract, and that there was no privity of contract where an agreement was made by a trustee for an intended company, even though the company had been afterwards formed. In substance I think the two cases indistinguishable.

But then it is said that that is not consistent with the decision of Kay J. in *Howard* v. *Patent Ivory Manufacturing Co.* (2), or that, if it is consistent, it is because *Howard* v. *Patent Ivory Manufacturing Co.* (2) establishes an exception to the general rule stated in the other case, and that the present case is within the exception. It is a little difficult to understand the decision in *Howard* v. *Patent Ivory Manufacturing Co.* (2), but with the assistance of counsel I have sufficiently mastered it for the present purpose. Kay J. there came to the conclusion that there was a contract to be inferred between

(1) 33 Ch. D. 16. (2) 38 Ch. D. 156.

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those who were suing and those who were sued. These are his own words (1): "In my opinion it is very clear that there was a contract between Mr. Jordan and the company. That is the only possible inference I can draw from the facts which I have stated." There was no express contract. That was not suggested, but from the facts which he had stated he inferred a contract which he could not find expressed. It is not of course contended that a judge or a jury might not in a proper case infer a contract which is not directly proved; but I venture to think—and this is without in the slightest degree impugning the authority of *Howard* v. *Patent Ivory Manufacturing Co.* (2)—that in a case of this kind one should not be hasty in inferring a contract, especially as one is dealing with a corporation which as a rule can only contract under seal by its directors, who are bound to keep minutes so that all the facts may be on record. Still, far be it from me to say that you cannot infer a contract against a company, or that Kay J. was not right in inferring a contract in the case before him. Now, why did he infer a contract? The key is to be found in two or three words used by the learned judge not many lines above the passage which I have just read. Speaking of the liquidator, and supposing him to deny all his liability when he had received all the benefit, he adds this (1): "Such a course of conduct would be, as I have characterized it during the argument, the most flagrant dishonesty." That, no doubt, assisted the learned judge to come to the conclusion that a contract ought to be inferred. I am indebted to Mr. Neville for having pointed out to me why and how the learned judge came to that conclusion. I think it is tolerably plain from the report when the facts are examined. There were meetings of the directors, and the question was whether there ought to be inferred a contract between Jordan and the company under which Jordan was entitled to certain debentures. Jordan had been present at the meetings of the directors, and at those meetings not only were minutes passed with his assent, but a modification was introduced with his assent, the result being that he was a party to everything that went forward, with the intention, in which

(1) 38 Ch. D. 168. (2) 38 Ch. D. 156.

he concurred, that he should be the performing party to the contract. After that it was not difficult, as it seems to me, for the learned judge to come to the conclusion that a contract between the company and Jordan ought to be inferred from the facts. That case is not like this one, and I cannot regard it as being any real exception, except under similar circumstances, to *In re Northumberland Avenue Hotel Co.* (1)

Then it is said that the defendants have adopted responsibility for these payments, and put themselves into the position of a contracting party by their conduct. In order to shew that, certain correspondence was read and references were made to the minutes of the defendant company. It comes to this—that the defendants thought they were liable. They made a mistake; but that cannot be used as an argument for saying that they adopted the contract. It is impossible to twist the correspondence and the minutes into meaning that the defendants were bringing themselves under a contract under which they already supposed themselves to be. That point is really disposed of by *In re Northumberland Avenue Hotel Co.* (1)

Then the plaintiffs relied on the case of *Werderman* v. *Société Générale d'Électricité.* (2) That again is a very peculiar case, requiring a little investigation; but when looked into, I do not think that it presents any difficulty. I do not think that it has any real resemblance to the case now in hand. There, certain persons who are referred to in the head-note as A. and B., and whom for convenience I will refer to as A. and B., had entered into a covenant on the assignment to them of letters patent that they or the survivor of them, or the executors or administrators of the survivor, their or his assigns, should make certain payments on account of the patent that was assigned, and the defendants were held by the Court of Appeal to be assigns of A. and B. within the meaning of that covenant. The question was whether they were under any liability to make those payments. The point taken there, as here, under a different state of facts, was that they had entered into no contract to pay. The Master of the Rolls, Sir George Jessel, disposes of that

(1) 33 Ch. D. 16. (2) 19 Ch. D. 246.

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point in a very few words. (1) "I think," he says, "it is tolerably plain that the parties intended certain liabilities to attach to the patent itself." Once you get to that, there is no further question about personal liability. The question was not whether the defendants had entered into a contract to pay, but whether they had taken property to which the liability was attached. If they had, they were bound to perform that as a condition of holding the patent. He puts the same point a little differently later on in his judgment (2), the only particular importance of that being that it compares with a passage in the judgment of Lindley L.J., where he says (3): "The case seems to me almost the same as the common case of persons on a dissolution of partnership assigning the assets charged with the payment of an annuity to the outgoing partner. In that case a purchaser of the assets with notice must take subject to the annuity." What the learned Lord Justice said and what the learned Master of the Rolls said agree exactly. It is only an expression of the same thing in different language. The defendants in that case were the assigns of a patent to which certain liabilities attached. They could not take the patent and say that they were not liable to pay the sums which had been agreed to be paid. In this licence there is a reference to the agreement and to the payments thereunder; but it is an independent agreement altogether dehors the licence for this purpose. It is as if it had said, "In consideration of the licensee having entered into a covenant to make certain payments." It is the covenant which is the consideration, and the covenant must be sued upon as a personal liability and not otherwise.

For these reasons I think that there is no right of action and that the action fails.

Solicitors: *Capel-Cure & Ball; Beale & Co.*

(1) 19 Ch. D. 251. (2) 19 Ch. D. 253.
(3) 19 Ch. D. 257.

H. B. H.

ATTORNEY-GENERAL *v.* COLE & SON.

KEKEWICH J.

1900

Nov. 2, 3, 6, 7; *Dec.* 11, 12, 18.

[1900 A. 227.]

Nuisance—Injunction—Noxious Trade—Reasonable Use of Premises.

In an action to restrain a nuisance, the question whether the defendant is acting reasonably from his own point of view is not material, and if he is carrying on business so as to cause a nuisance to his neighbours he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner.

Reinhardt v. *Mentasti*, (1889) 42 Ch. D. 685, 690, is not inconsistent with the observations of Lord Selborne in *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467, or with *Bamford* v. *Turnley*, (1860) 3 B. & S. 62.

THIS was an action by the Attorney-General at the relation of the board of works for the Wandsworth district to restrain a public nuisance.

The defendant carried on the trade of a fat-melter at Southfields under the name of Cole & Son, and the nuisance complained of was alleged to arise from the emanation of noxious gases from the defendant's works.

The defendant had carried on his business at the same works and in the same way for thirty years, but the neighbourhood, which was formerly open country, had been built over to any large extent only within the last five or six years.

The defendant conducted his business in a proper manner, and took precautions to prevent it from being injurious to his neighbours.

The evidence established that a public nuisance was created by the defendant.

Warrington, Q.C., and *Lyttelton Chubb*, for the plaintiff and the relators.

P. O. Lawrence, Q.C., and *Stewart-Smith*, for the defendant.

KEKEWICH J., in dealing with the question whether a public nuisance had been created by the defendant and whether an injunction ought to be granted, said:—A good deal has been

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said in the course of this case with reference to the difference of neighbourhoods and the way in which the defendant is carrying on his business. Really and truly it all comes to this, that the defendant is carrying on a lawful trade; reasonably carrying it on in a place which may fairly be devoted to that particular class of trade; and carrying it on in such a way that no man can say that he is guilty of extravagance in the manner in which he is conducting his business. That point has been raised again and again in different forms, and we have in many of the cases the contrast pointed out between Belgrave Square and Bermondsey, and other contrasts of a like character, and statements have been made again and again to the effect that what is a nuisance in one place is not necessarily a nuisance in another. But the truth is that that does not carry us far, because you are brought back after all to the question, Is what is complained of a nuisance? And if it really is a nuisance, then it seems almost to follow as a matter of course that it is a nuisance which ought to be restrained, assuming that it is not of a trifling or a passing character. It fell to me to consider this question very much in the case of *Reinhardt* v. *Mentasti* (1), which I refer to because I venture to think that my judgment has been misunderstood. I thought in that case that I was not at liberty to consider whether the defendant was doing what was reasonable from his point of view. He was conducting an eating-house near another man's dwelling-house, and he was conducting it in a very reasonable manner as regards an eating-house. He was doing that which was for the convenience of his customers, but in doing so he created a nuisance; and it seemed to me there that when once you established that he was creating a nuisance, the fact that he was doing what was reasonable from his point of view was no defence. Buckley J. has commented upon that in a recent case of *Sanders-Clark* v. *Grosvenor Mansions Co.* (2), where he seems to think that I differed in effect from Lord Selborne. (3) Of course, nothing could be further from my intention, and although perhaps the blame

(1) 42 Ch. D. 685, 690. (2) [1900] 2 Ch. 373.
(3) *Ball* v. *Ray*, L. R. 8 Ch. 467, 469.

may have been mine in the use of language, Buckley J. has a little misunderstood what I intended to say. That case has also been commented upon by Mr. Garrett in his work on nuisances. He seems to think that my judgment differs from that of the Court of Exchequer Chamber in *Bamford* v. *Turnley*. (1) It so happens that I studied *Bamford* v. *Turnley* (1) with great care before I gave my judgment in *Reinhardt* v. *Mentasti* (2), and intended to found my judgment on the judgment of the Exchequer Chamber. I have taken this opportunity of again reading *Bamford* v. *Turnley* (1), and still think that, notwithstanding those criticisms, what I said in *Reinhardt* v. *Mentasti* (2) was altogether agreeable, as it was intended to be agreeable, to what was laid down in *Bamford* v. *Turnley*. (1) These remarks are not meant with regard to my own case so much as to bring me back to the question, which I think may be stated in this manner, Can a man reasonably create a nuisance? That seems to me to be the question. I think the answer to be derived from the case of *Bamford* v. *Turnley* (1), from which, so far as I am aware, there has never been any departure at all, is that he cannot. If he commits a nuisance, then he cannot say that he is acting reasonably. The two things are self-contradictory. That seems to me to be the short result, and I think it ought to apply here.

Mr. Cole erected this building some time ago to carry on a lawful trade, and he has been anxious to do everything he possibly could to prevent his trade from being an injury to his neighbours. It is conducted in a perfectly decent and proper way. From his point of view he is a reasonable man; but from the point of view which I have laid down he is not acting reasonably if he commits a nuisance.

[His Lordship then reviewed the evidence with the result above stated, and he accordingly granted an injunction.]

Solicitors: *W. W. Young & Son; Alexander Pope, for H. R. Jones, Wandsworth.*

(1) 3 B. & S. 62.

(2) 42 Ch. D. 685, 690.

H. B. H.

BYRNE J.
1900
Nov. 23, 27.

FOSTER *v.* NEW TRINIDAD LAKE ASPHALT COMPANY, LIMITED.

[1900 N. 1654.]

Company—Dividend—Accretion to Capital—Capital or Profits.

The question of what is profit available for dividend, depends upon the result of the whole accounts fairly taken for the year, capital, as well as profit and loss, and though dividends may be paid out of earned profits in proper cases, notwithstanding a depreciation of capital, a realized accretion to the estimated value of one item of the capital assets, cannot be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

Among the assets taken over by a new company in 1897, on the purchase of the undertaking of an old company, were promissory notes for $100,000 given in 1894 to the old company by the B. Company: these notes, which had never been considered of any value, and had never appeared as assets in the balance-sheets of the new company, had recently been paid off with arrears of interest, and the directors proposed to treat the whole sum as a windfall in the nature of an unexpected profit and divisible as dividends:—

Held, that the $100,000 ought not to be distributed as dividend without reference to the other business or assets of the company.

MOTION.

This was an application on behalf of debenture-holders and of a shareholder in the New Trinidad Lake Asphalt Company, Limited, which raised the question as to the proper method of dealing with an unexpected appreciation of assets. It was for an interim injunction to restrain the company and its directors from declaring or paying a dividend out of a sum of $100,000, part of a sum of $127,355, recently received from the New York and Bermudez Company, and from treating the said sum of $100,000 or any part thereof as available for distribution, or so distributing the same.

The matter being considered a pressing one, the application was made on short notice, but the balance-sheets for the year 1898, presented in May, 1899, and books of the company were put in evidence. The facts, as stated in the plaintiffs' affidavits,

which were accepted by the Court for the purposes of this decision, were as follows :—

In 1894 an American company, the Trinidad Lake Asphalt Company, Limited (referred to in the affidavits as the "old company"), acquired the stock and bonds of the New York and Bermudez Company, and also a debt of $100,000 due from the latter company to the old company and secured by promissory notes. In 1897 the defendant company, an English company, purchased the property and assets of the old Trinidad Company, including the debt for $100,000 then due from the New York and Bermudez Company.

On December 31, 1899, the New York and Bermudez Company gave to the defendant company new promissory notes for $127,355, being the amount of the said debt of $100,000 with accrued interest thereon. The notes for this $127,355 had recently been paid off, and the defendant company, through their directors, now proposed, without reference to the other business or assets of the defendant company, to treat the whole of that sum, amounting to 26,258*l.* 16*s.* in English currency, as assets available for dividends, and to distribute the same accordingly. It was also stated in one of the defendants' affidavits that on the balance-sheets of the company these promissory notes had never appeared as part of the assets, and that the only entry relating to them was in a journal entry, carrying them to the profit-and-loss account.

Levett, Q.C., and *Cassel*, for the plaintiffs. $100,000 of this $127,355 is not profit earned, and is, therefore, not properly distributable as dividend: it represents one of the assets of the company purchased some years ago, which has realized more than was originally expected, but it is none the less an asset, and cannot be treated as profit. The present case is distinguishable from *Lubbock* v. *British Bank of South America*. (1) In that case, part of the undertaking was sold at an enormous profit, and the net balance, after replacing capital, was held available for dividend. Here the directors are proposing to

(1) [1892] 2 Ch. 198.

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make an ultra vires payment of dividends out of capital, and ought to be restrained from so doing.

Mulligan, Q.C., and *J. I. Stirling*, for the defendants. The articles of association of this company providing for dividends and audit speak of "profits," not "profits earned in the business." In the balance-sheet for 1898, produced at the general meeting in May, 1899, no reference whatever is made to this debt: it is not referred to in any of the books as an asset. So long as we keep the capital up to its full valuation, any appreciation of capital on the whole account may properly be treated as profits. The method of ascertaining profits given in *Lubbock* v. *British Bank of South America* (1) is the right one: that decision exactly covers this case. The correctness of that decision was recognised in *Verner* v. *General and Commercial Investment Trust.* (2) "Profits" mean the surplus in receipts after paying expenses and restoring the capital to its original amount: *Dent* v. *London Tramways Co.* (3); Buckley on the Companies Acts, 7th ed. p. 554. This $100,000 is therefore entitled to be treated as a windfall and divided as profits. The money used by the Bermudez Company to pay off these promissory notes might have been applied by that company as payment of dividends, and in that case the defendant company, as the holder of nearly the whole of the shares in the Bermudez Company, would have received nearly the whole of this $100,000 as income; so that we are only proposing to distribute as dividends what might have been received by us as profits in another capacity, namely, as shareholders of the Bermudez Company.

Levett, Q.C., in reply. The assets of the old company were bought by the new company as a whole; because one item of the assets turns out to be more valuable than was expected, it does not follow that it may be treated as profit; regard must be had to the value of the assets as a whole: this $100,000 is not "profit" in the commercial sense of the word.

Cur. adv. vult.

(1) [1892] 2 Ch. 198. (2) [1894] 2 Ch. 239.
(3) (1880) 16 Ch. D. 344, 354.

Nov. 27. BYRNE J., after stating the facts, continued:— This is the statement in the plaintiffs' affidavit, and it is not denied by the defendants, so that, although some discussion took place in argument upon the point, I have not now to consider whether or not the amount in question may properly be brought into the next profit-and-loss account, but simply whether or not the amount may be divided as profit, without regard to the present value of the total capital assets, and whatever the result of the year's trading may be. No question is raised as to so much of the sum as represents interest, the point at issue being as to the amount representing principal of the debt. There is no doubt that the debt formed part of the assets originally purchased by the defendant company, and as such, part of its original capital assets, but it is argued that as the debt was not regarded or treated as an asset of any value upon the purchase, and as it has not appeared in the former balance-sheet as part of the assets of the company, and as the only entry in relation to it in the books of the company is a journal entry carrying the notes to a profit-and-loss account, it ought to be regarded as a windfall in the nature of an unexpected profit, and as divisible accordingly amongst the shareholders. I cannot accept this view. Although the agreement for sale does not enumerate the debt or notes in question in the schedule which purports, according to its heading, to be a statement of assets and liabilities of the old Trinidad Asphalt Company, that schedule is, as appears by clause 1 of the agreement, an enumeration of matters and things which the vendor warranted to be included in the property sold, or the equivalent in value thereof. Some of the items mentioned in the schedule may have been overvalued, some undervalued, and no doubt fluctuations in value of the assets have supervened, but the amount of this debt is a distinct item of the property purchased which has since been realized by payment. It appears to me that the amount in question is primâ facie capital, and that I have no evidence which would justify me in saying that it has changed its character because it has turned out to be of greater value than had been expected. It was urged for the defendants that the amount applied in payment of the debt was money

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earned by the Bermudez Company by favour of the defendant company, and represents a profit which would otherwise have been earned by the defendant company, and, furthermore, that this money might have been applied by the Bermudez Company in payment of a dividend on the shares in that company, in which case the defendant company, as owning 9842 shares out of a total of 10,000 in that company, would have received the greater portion as income. I am unable to follow this argument, as I do not see how for the purposes of the present motion, I can have regard to the fact that some other course of dealing by the debtor company would have left the debt still outstanding, and would have produced more income for the defendant company. I think that I ought to grant an injunction until judgment or further order to restrain the defendants from distributing the $100,000 as dividend without reference to the other business or assets of the defendant company. I must not, however, be understood as determining that this sum or a portion of it may not properly be brought into profit-and-loss account or be taken into account in ascertaining the amount available for dividend. That appears to me to depend upon the result of the whole accounts for the year. It is clear, I think, that an appreciation in total value of capital assets, if duly realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America* (1), cited with approval by Lord Lindley in *Verner* v. *General and Commercial Investment Trust* (2), where he says: "Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word 'capital' means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America*." (1) If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the

(1) [1892] 2 Ch. 198. (2) [1894] 2 Ch. 239, 265.

whole accounts fairly taken for the year, capital, as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realized accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

Solicitors: *W. H. Paterson; Ashurst, Morris, Crisp & Co.*

W. C. D.

TURNER *v.* SMITH.

[1890 T. 849.]

Mortgage—Transfer without Notice to Mortgagor—Payment of Mortgage Debt by Mortgagor—Fraud of Mortgagor's Solicitor—Priority of Mortgagor and subsequent Transferee.

In 1886, a mortgage debt for 1500*l.* was duly transferred and the mortgaged property was conveyed, by way of security, to F., the plaintiff, the mortgagor, being a party. Several subsequent transfers, to which the plaintiff was not a party, were made, and in February, 1896, the mortgage debt and the security were vested in one Hamp. In 1892 the plaintiff gave Harrison, her solicitor, the money to pay off the mortgage, which he did not do, though he continued to pay interest on the mortgage as it became due to the transferee for the time being. The plaintiff made no inquiry in 1892 for the reconveyance nor for the title-deeds, but left the whole matter in the hands of her solicitor. In October, 1897, Hamp transferred the mortgage debt and the property to Harrison, and the next day Harrison transferred the same to the defendant, to whom the deeds were handed. The cheque for 1500*l.* from the defendant was paid by Harrison into his private account, and the cheque to Hamp was drawn by Harrison on his firm's account, which was then in funds, at another bank. In December, 1899, application was made by the defendant to the plaintiff for arrears of interest, and the fraud was discovered. On an action by the plaintiff to establish her priority over the defendant, and for a reconveyance of the mortgaged property:—

Held, that on the transfer to Harrison the mortgage debt became discharged, and he held the property as trustee for the plaintiff; that the defendant, having taken the transfer from Harrison without the privity of the mortgagor, could only hold it against the mortgagor subject to the state of account between Harrison and the mortgagor, and as between them the debt was non-existent; that the plaintiff had never lost the right to redeem, and that directly the agent, who had received the amount

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to pay off the mortgage, became himself the transferee, the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge upon the property, and that the plaintiff was therefore entitled to priority and to have a reconveyance from the defendant.

TRIAL OF ACTION.

The object of this action was to establish the priority of the plaintiff, as mortgagor, over the defendant as transferee of a mortgage originally made by the plaintiff, and to obtain a reconveyance of the mortgaged property freed from the incumbrance claimed by the defendant, and delivery up of the title-deeds on payment of the costs of reconveyance. The case arose from the frauds of the late Cartmell Harrison, a solicitor. The facts, so far as material, and the result of the evidence as found by the Court, were as follows:—

On December 23, 1879, the plaintiff, Lady Mary Ann Page Turner, being then owner in fee simple of No. 1, Queensborough Terrace, Bayswater, by a memorandum in writing charged the property with repayment to James Ingram, Cartmell Harrison, and James Crofts of 1000*l.* and interest at 4½ per cent., and by another memorandum in writing dated October 26, 1880, she further charged the property to the same persons with repayment of 500*l.* and interest at the same rate. By a deed of settlement dated June 11, 1881, made on the marriage of the plaintiff with the Rev. Thomas Isaac Guest, the property was conveyed, subject to the memorandum of charge, to uses under which the plaintiff became legal tenant for life in possession. By a deed dated November 20, 1886, made between Messrs. Ingram, Harrison & Crofts of the first part, and the Rev. T. I. Guest and the plaintiff, then his wife, of the second part, and Cartmell Harrison of the third part, and Messrs. Freeman of the fourth part, the mortgage debt of 1500*l.* and interest was transferred, and the property was conveyed to Messrs. Freeman by way of mortgage to secure the same debt and interest. By a deed dated December 23, 1886, the mortgage was transferred by Messrs. Freeman to Messrs. Maul, and by them to William Negus, the last transfer being dated January 30, 1891. The mortgage debt and security were transferred on December 8, 1893, from

Negus to Mary Le Neve Foster, and by her again on February 20, 1896, to Thomas James Hamp. All the transfers subsequent to that to Messrs. Freeman were effected without any reference to the mortgagor, the plaintiff, who was not a party to any of the deeds, no notice of them was given to her, nor were any inquiries made of her as to the state of the account or otherwise. In the months of February and April, 1892, and while the mortgage was still vested in Negus, the plaintiff put Cartmell Harrison, who was acting as her solicitor, in funds for the purpose of paying off the mortgage, which he undertook to do, but did not do. He cheated his client, appropriated the money, and maintained the cheat by continuing to pay interest on the mortgage as it became due to the mortgagee for the time being. No inquiry was made in 1892, or subsequently, by the plaintiff for any reconveyance or receipt by the mortgagee, nor for the deeds relating to the property. She left the whole matter in the hands of her solicitor, Cartmell Harrison, and as she never paid any more interest, and was not charged in account with any by Harrison, her suspicions were not aroused in any way. In January, 1896, while the mortgage was still vested in Mary Le Neve Foster, it appeared that Negus, who was acting as her solicitor, was pressing Harrison, who had been paying the interest as if on behalf of his client, the plaintiff, for payment off of the mortgage debt, and apparently this resulted in the transfer to Hamp, a client of Negus. At the end of May, or on June 1, 1897, Negus seems to have given notice on behalf of Hamp to Harrison calling in the mortgage, for on June 1, 1897, Harrison wrote to Negus: "I return the notice. You do not say when the money is to be paid off. I presume in six months." Harrison then appears to have represented to Negus that he was arranging a transfer, as on September 2, 1897, he wrote: "My dear Negus,—Re Hamp.—I return you this draft transfer approved. The money, however, will not be in for some little time." The draft transfer referred to was believed to have been in blank, so far as the name of the transferee was concerned. Harrison then seems to have been negotiating with one J. W. Smith to become transferee of some mortgage,

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although as found by the Court there was no evidence to shew that he identified the particular mortgage he intended to obtain a transfer of, but on September 20, 1897, he wrote to Negus to this effect: "We shall be prepared to complete the transfer on October 1." On October 1, 1897, Harrison again wrote: "My dear Negus—Queensborough Terrace,—For some reason or other (I do not know what) my client did not send his cheque as he promised to do to-day, but I have written to him to ask him to see me on Monday morning, when I shall no doubt get it and complete"; and on the same day he writes to J. W. Smith: "My dear Sir,—I am disappointed at not hearing from you or seeing you. I shall be coming up on Monday, and will come by the 9.53 train so as to have the opportunity of seeing you." Mr. J. W. Smith forwarded to Harrison 1500*l.* on or before October 4, 1897, as the latter acknowledged the receipt of a cheque for the amount on that day, and the cheque was duly paid in to Harrison's private account at Drummonds' on the following day, October 5. By deed of transfer, dated October 4, 1897, Hamp transferred the mortgage debt and property to Harrison, the cheque by which Hamp was paid off being drawn on Harrison's firm account, then in funds, at another bank. On the following day, October 5, 1897, Harrison transferred to J. W. Smith and the defendant, in whom the whole interest formerly of J. W. Smith and himself was now vested. The deeds were handed over by Harrison to the Messrs. Smith, and as Harrison continued to pay interest to them until April, 1899, their suspicions were not aroused and no question was raised until December, 1899, when application was made to the plaintiff for payment of the half-year's interest which became due in the previous October, and the fraud was discovered.

On May 22, 1900, the present action was commenced, the plaintiff claiming (1.) a declaration that at the date of execution and delivery of the said indenture of October 5, 1897, no money was due from the plaintiff to the said Cartmell Harrison upon the above-mentioned security purported to be thereby secured; and (2.) that the defendant might be ordered, upon proper evidence of the plaintiff's title to the said messuage, to execute

a reconveyance thereof freed from all claims under the said security or any transfer thereof, and to deliver to the plaintiff all deeds and documents in the possession or under the control of the defendant relating to the title to the said messuage.

Norton, Q.C., and *Rashleigh*, for the plaintiff. The mortgage having been paid off by the plaintiff, as soon as the legal estate passed to Harrison on the transfer from Hamp, Harrison held the property as trustee for the plaintiff, and could not create any security in favour of the defendant. The plaintiff's money was paid to Harrison; Hamp was paid off by a cheque on Harrison's firm account which was then in funds, and as a fact the defendant's money did not go to pay off Hamp. Where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews* v. *Wallwyn*. (1) Payments of interest, or payments on account of principal, or payment of the whole mortgage debt, made by the mortgagor to the mortgagee after, but without notice of, a transfer must be allowed to the mortgagor as against the transferee: *Williams* v. *Sorrell* (2); *Norrish* v. *Marshall* (3); *In re Lord Southampton's Estate* (4); *Dixon* v. *Winch*. (5) As between the defendant's transferor, Harrison, and the plaintiff, the mortgage was paid off; the defendant took subject to the state of this account, and therefore cannot hold this security as against the plaintiff. The defendant made no inquiry of the plaintiff as to the state of the account; he gave no notice of the transfer; had he done so the fraud would have been at once discovered. There was no negligence on the part of the plaintiff in leaving the deeds with her solicitor; she was only tenant for life at this time, she believed a reconveyance had been made, and she was then justified in trusting her solicitor, Harrison, and in assuming that the matter would be carried out properly. *Gordon* v. *James* (6) is distinguishable. The fact that the defendant has the legal estate does not help him.

(1) (1798) 4 Ves. 118.
(2) (1799) 4 Ves. 389.
(3) (1821) 5 Madd. 475.
(4) (1880) 16 Ch. D. 178.
(5) [1900] 1 Ch. 736.
(6) (1885) 30 Ch. D. 249.

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Rowden, Q.C., and *Phillpotts*, for the defendant. Harrison in effect never was the transferor; the assignment to him of October 4 for one day was a mere conveyancing form; he never really meant to take a transfer. The plaintiff, by her negligence in not asking for the reconveyance or receipt for the mortgage money, and by leaving her deeds with Harrison, put it into his power to commit this fraud, and is the more guilty of these two parties.

The rule that the transferee takes subject to the state of the account between the mortgagor and mortgagee does not apply to this case, where there was negligence on the part of the mortgagor; there being an existing debt due to Hamp, as is admitted, and Harrison having the defendant's money in his possession at the time he was a trustee for him, the two deeds of October 4 and 5 were in effect one transaction: *Harman* v. *Richards* (1); and the defendant is in the same position as if Hamp had transferred direct to him. The defendant has been guilty of no negligence sufficient to deprive him of the benefit of the legal estate: any inquiries as to the state of the mortgage debt, or notice of transfer, through Harrison, would have been fruitless.

[They referred to *Heath* v. *Crealock* (2) and *Gordon* v. *James*. (3)]

Norton, Q.C., in reply. There is no evidence to shew that the defendant advanced his money for the purpose of this particular transfer; or was ever told that this property was to be the security.

Cur. adv. vult.

Dec. 11. BYRNE J., after stating the facts, continued:— The real question is, which of the two innocent parties, the plaintiff or defendant, is to suffer for the frauds of Cartmell Harrison, the plaintiff claiming that upon the transfer to Cartmell Harrison by Hamp the mortgage debt was discharged, and that by taking a transfer without the privity of the mortgagor, the transferees, Messrs Smith, became bound by the

(1) (1852) 10 Hare, 81. (2) (1874) L. R. 10 Ch. 22.
(3) 30 Ch. D. 249.

state of account as then existing between their transferor and the mortgagor, and that therefore the defendant cannot claim to hold the property as against the plaintiff. On the other hand, it is contended that the plaintiff by her neglect, in not seeing that she obtained a reconveyance or receipt for the mortgage money, and by not asking for the deeds, put it into the power of Harrison to commit the fraud, and gave colour to the false representations which were made in the transfer to Messrs Smith as to the subsistence of the mortgage debt. It is also suggested that the two transfers of October 4 and 5, 1897, must be looked upon as parts of one transaction, and that the transfer to Harrison ought not to be regarded as representing anything more than part of the machinery for transferring the debt and security from Hamp to Messrs. Smith, and not as representing any real transaction. Up to the date of the transfer to Cartmell Harrison the plaintiff admits that, as between herself and the subsequent transferees, there was a valid and subsisting debt and mortgage security, inasmuch as no part of the debt had been paid, although Harrison, as the plaintiff's agent, had received the money for the express purpose and with the obligation of paying off the then mortgage in the year 1893. The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by Cozens-Hardy J., in the case of *Dixon* v. *Winch* (1), that I cannot do better than adopt his words, which are to be found at p. 742 of the report: "It is well settled that where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews* v. *Wallwyn*. (2) And it is also well settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee: *Williams* v. *Sorrell*. (3) This doctrine has been extended to the case where the whole mortgage debt is, under similar

(1) [1900] 1 Ch. 736. (2) 4 Ves. 118.
(3) 4 Ves. 389.

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circumstances, paid off: see *Norrish* v. *Marshall* (1) and *In re Lord Southampton's Estate*." (2) I need not refer to the expression of opinion which follows because the learned judge recognises the law as stated, nor need I go further into the decision in that case either in the Court of first instance or in the Court of Appeal, as it turned on very special facts which differ from those in the present case. Starting with the statement of the law as above, it appears to me that, assuming the transfer to Harrison to have operated as an assignment and conveyance to him in his personal capacity, and not in the capacity of trustee for Smith, the result must follow that the mortgage debt immediately became discharged, and that he held the property as trustee for the plaintiff, the principle being as stated by Sir John Leach in *Norrish* v. *Marshall* (3): "That as against an assignee without notice" (meaning without notice to the mortgagor) "the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the mortgagee, he can claim equally against the assignee." There is no evidence that Harrison had agreed to invest Smith's money in a particular mortgage, and, although it is not very easy to understand why Harrison took the transfer to himself only to transfer it on the following day, the fact remains that he did take a transfer to himself, and it may be that, being uncertain whether he should get the money from Smith, he obtained the transfer to himself before receiving the cheque. He certainly did so before the cheque was credited to him. The money paid by Harrison to Negus was paid by cheque drawn on the account of the firm of Ingram, Harrison, & Ingram at Messrs. Hoare's by cheque debited to the firm on October 5; and I am unable to hold that at the time of the transfer to himself he had constituted himself a trustee of this particular security for the Messrs. Smith; and I think, therefore, that the latter, having taken the transfer from Harrison without the privity of the mortgagor, the defendant can only hold it against the latter subject to the state of account between Harrison and the mortgagor. As between

(1) 5 Madd. 475. (2) 16 Ch. D. 178. (3) 5 Madd. 481.

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Harrison and the mortgagor, the mortgage debt was non-existent. It appears to me that the mortgagor never lost her right to redeem, and that directly her agent, who had received the amount to pay off the mortgage, became himself the transferee of the mortgage, the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge upon the property. In the result, I think the plaintiff is entitled to succeed and to have a reconveyance.

Norton, Q.C., said that in the circumstances the plaintiff did not wish him to ask for costs.

Solicitors: *Beachcroft, Thompson & Co.; R. T. Harding, for H. Wills Chandler, Basingstoke.*

W. C. D.

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In re HAYWARD. TWEEDIE *v.* HAYWARD.

[1896 H. 2633.]

Right of Retainer — Insolvent Estate — Legal Personal Representative and Devisee—Tenant for Life—Cestui que Trust of the Debt—Claim of Trustees of Settlement.

A testator, by the settlement made on his marriage with the defendant, his wife, covenanted with the trustees for the payment of a sum of 5000*l.* six months after his death, to be held upon trust for the defendant for life, and for the children of the marriage, and in default of children for the testator absolutely: the testator's residuary real and personal estate was devised and bequeathed to the defendant absolutely, and letters of administration with the will annexed had been granted to her: there were no children, and the estate was insolvent. The defendant, as the widow and personal representative and devisee of the real estate, claimed the right to retain this 5000*l.* out of the testator's real and personal estate on behalf of herself and the trustees of the settlement in priority to all other creditors:—

Held, that the trustees of the settlement being the persons to sue for and recover this 5000*l.* debt, and not the legal personal representative, she had no right of retainer.

Loomes v. *Stotherd*, (1823) 1 S. & S. 458; 1 L. J. (O.S.) (Ch.) 220; 24 R. R. 209, examined, and held to have been overruled on this point by *In re Dunning*, (1885) 54 L. J. (Ch.) 900.

FURTHER CONSIDERATION.

The only question raised on the further consideration of this

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administration action which calls for any report was whether a legal personal representative, who was also tenant for life under a settlement made by the testator, had any right of retainer in respect of a life interest in a sum of 5000*l.* covenanted to be paid to the trustees of the settlement six months after death. The facts, so far as material, were as follows:—

By a settlement of August 14, 1889, executed on the marriage of the above-named Richard Henry Hayward and the defendant Ada Mary Hayward, his wife, the said R. H. Hayward covenanted with the trustees of the settlement that in case the said intended marriage should take place, the executors or administrators of the covenantor should within six calendar months from his death pay to the trustees or trustee the sum of 5000*l.*, with interest for the same at the rate of 5*l.* per cent. per annum from the day of his death, with power for the executors or administrators to pay the trustees or trustee part, or the whole, of the said sum of 5000*l.* immediately after the decease of the covenantor, with interest thereon to the date of payment. This 5000*l.*, when invested as therein provided, was to be held upon the usual trusts for the benefit of the wife for life, and after her death for the children of the then intended marriage, and in default of children upon trust for the covenantor absolutely.

Richard Henry Hayward died in August, 1896, without having any children, having made a will by which, after divers legacies and an annuity, he devised and bequeathed all the residue of his property to his wife, the defendant, absolutely, but appointed no executor. Letters of administration with the will annexed were shortly afterwards granted to the defendant. R. H. Hayward's estate being insolvent, an action for the administration of his real and personal estate was commenced by the trustees of the settlement on behalf of themselves and all other creditors, in which the widow was the sole defendant.

In December, 1898, a claim was made in chambers by the trustees and the defendant against R. H. Hayward's estate for 5000*l.* and interest at 5*l.* per cent. from his death in respect of the sum so covenanted to be paid as aforesaid by the settlement; the claim then proceeded: "The defendant, as the

widow and executrix and devisee of the real estate of the testator, claims the right to retain the said 5000*l.* and interest out of all the testator's real and personal estate on behalf of herself and the trustees, in priority to all other creditors." The master by his certificate of August 1, 1900, allowed this claim "without prejudice to the question whether the said defendant Ada Mary Hayward has a right to join in the said claim." The certificate also contained a finding in respect of the settlement which, after referring to the covenant for the payment of 5000*l.*, continued: "This last-mentioned sum has been proved by the trustees of the said settlement as a debt against the testator's estate, and has been allowed at the sum of 5000*l.*," and also found "that under or by virtue of the said settlement the reversionary interest in the said sum of 5000*l.*, subject to the life interest therein of the defendant, belongs to the testator's estate."

Norton, Q.C., and *Romer*, for creditors having the conduct of the proceedings. The defendant has no right to join in this claim; she is only tenant for life of this 5000*l.*; the attempt to join in the claim of her trustees is only made to get a right of retainer as administratrix in respect of this sum. The trustees are the proper persons to sue for and recover this 5000*l.*, not the defendant, and under these circumstances the defendant has no right of retainer: *In re Dunning* (1), which is precisely in point. There are dicta in *Loomes* v. *Stotherd* (2) and *Cockroft* v. *Black* (3) which at first sight appear in favour of the defendant's claim to retain, but in *In re Dunning* (1) Lindley L.J. remarks upon *Cockroft* v. *Black* (3) that it had reached the farthest point in reference to this right of retainer, and that it ought not to be extended. *Loomes* v. *Stotherd* (2) does not appear to have been cited in *In re Dunning* (1), but it is inconsistent with that decision and must be taken to have been overruled. *Franks* v. *Cooper* (4), though following *Cockroft* v. *Black* (3), does not go any further.

(1) 54 L. J. (Ch.) 900.
(2) 1 S. & S. 458; 1 L. J. (O.S.) (Ch.) 220; 24 R. R. 209.
(3) (1725) 2 P. Wms. 298.
(4) (1799) 4 Ves. 763.

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Rowden, Q.C., and *J. G. Wood*, for the defendant. The legal personal representative is entitled to retain in respect of a debt due from the testator to trustees for her: *Cockroft* v. *Black*. (1) *Loomes* v. *Stotherd* (2) is in point, and is not overruled by *In re Dunning* (3); it is referred to as a binding authority in text-books: Theobald on Wills, 5th ed. 714; Seton on Judgments, 5th ed. p. 1286. In that case, too, the claimant was only tenant for life of the fund; the fact that the defendant is not the trustee but the cestui que trust of this debt can make no difference in equity. *In re Dunning* (3) was a case of a breach of trust; the defaulting solicitor could not be treated as a debtor to the separate and successive interests under the settlement; it was not a case of contract or covenant, as it was here. The attention of the Court of Appeal was not called to *Loomes* v. *Stotherd* (2), so that *In re Dunning* (3) cannot be considered as having overruled *Loomes* v. *Stotherd*. (2)

[BYRNE J. referred to *Thompson* v. *Thompson*. (4)]

At any rate, if the defendant cannot retain the whole 5000*l*., she ought to be allowed to retain in respect of her life interest: this amount can be ascertained and valued.

Norton, in reply.

[The case was adjourned for a day to enable the record in *Loomes* v. *Stotherd* (2) to be examined. The result of this investigation is referred to in the judgment.]

BYRNE J. having stated the questions for decision and the facts, continued:—The form of the certificate as to this claim by the defendant was framed in this way in order that the question might be raised, which has been raised before me, namely, whether the defendant, the administratrix, has a right of retainer in respect of her life interest in this 5000*l*. In my opinion the point is covered by the authority to which I have been referred of *In re Dunning*. (3) The facts of that case are sufficiently stated in the commencement of the judgment of Cotton L.J. for the purposes of explaining the decision (5): "The testator

(1) 2 P. Wms. 298.
(2) 1 S. & S. 458; 1 L. J. (O.S.) (Ch.) 220; 24 R. R. 209.
(3) 54 L. J. (Ch.) 900.
(4) (1821) 9 Price, 464.
(5) 54 L. J. (Ch.) 902–3.

acted as solicitor to the trustees of his marriage settlement, under which his wife took a life interest, with remainder to his children. This fund got into the testator's hands, and was not accounted for, and for it he is clearly liable. But the claim of his executrix to retain this debt out of his assets stands on a wholly different footing. The right to retain arises wholly from the fact that, as a creditor by suing at law and obtaining judgment could get priority for his debt, and an executor who was also creditor could not sue himself, he was allowed the same advantage as he would have gained had he been able to sue, and was allowed to retain the amount of his debt in priority to other creditors. And he was allowed this right even in a case where he was trustee only of the amount due, or where he was himself beneficially entitled to the debt, though it was actually payable to another person as trustee for him." Then the learned judge proceeds to deal with the particular case, saying: "The retainer has been allowed on the footing of the widow's life interest being valued as if it were an annuity owing to her from the testator, besides being allowed in respect of his children's right in remainder. Now, if the right to receive this debt and the liability to pay the same were centred in the same person, it would be right to allow the retainer. But here the executrix was not the person in whom the right to recover the debt was vested, as there were existing at the testator's death trustees of the settlement who were competent and bound to sue for and obtain judgment against the executor for the amount, or to take proceedings for administration of the estate." I need not refer to the rest of that judgment. Lindley L.J., referring to the case of *Cockroft* v. *Black* (1), speaks of it as reaching the farthest point in reference to the right of retainer which, as he explains, "is somewhat an anomalous privilege, and it has often been laid down that it ought not to be extended, and it has never yet been extended to the degree asked for here." I think myself that every word of the decision of Cotton L.J. in that case applies to the present case. In the present case there are trustees who were competent to sue for, and might have sued for, the

(1) 2 P. Wms. 298.

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amount of the debt, and I should have left the case there, simply saying it was covered by authority, except for the fact that the case of *Loomes* v. *Stotherd* (1) has been dealt with and relied upon as an exact authority of long standing in the books on this very point. In reference to the report of that case, which is also reported with rather a fuller statement of the facts in the 1st *Law Journal Reports*, p. 220, I find that there were two points argued: the first, a very important point, deciding that a devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him; and the other point being as to the costs of the administration as to in what order they should come with reference to the right of retainer. But the facts in that case—and here I have been assisted by Mr. Wood and by Mr. Norton's junior by their having referred to the record of the case—appear to have been, as quite shortly stated in the report, that 1674*l.* was found due from the estate to the trustees of the testator's marriage settlement upon a bond for securing 2500*l.* for the benefit of the defendant and her children, as it is expressed in the report. It appears that the trusts were in effect for the defendant for life, with some special power of paying certain debts, and then with remainder to her children, so that the defendant had in fact only a limited interest in the fund. At the end of the argument for the defendant it was said, "The circumstance that this defendant is not the trustee, but the cestui que trust of this debt, cannot make any difference in a Court of Equity." No doubt that is perfectly true in the case of a simple trustee for another person. The Vice-Chancellor says: "At common law an heir could retain for his own specialty debt: so a devisee, under the statute, must have the same right as an heir. An executor may retain his own debt, or the debt of his trustee; and, therefore, a devisee may retain for his own specialty debt, or the debt of his trustee, and, if the devisee be also the executor of a deceased creditor, he may first retain for his own debt, and next for the debt of his testator." Then his Lordship deals with the question of the costs of the suit, and says: "But the devisee cannot retain

(1) 1 S. & S. 458, 461; 24 R. R. 209.

his debt in priority to the costs of the suit." So far as the report goes, it appears simply to be a decision upon the points I have mentioned, but undoubtedly it was a case where a devisee, a defendant, was allowed to retain out of the proceeds of the estate though having only a limited interest in the fund. The case has not got into any of the text-books to which I have been referred, as being an authority for the proposition for which it is now invoked, nor have I been referred to any case, nor do I think there is any case, in which it has been followed as an authority for the purpose for which it is now sought to be used. Therefore I have not the same difficulty about an old standing case that I should otherwise have had by reason of its having been followed, or treated as being an authority for this, that the tenant for life or cestui que trust, is entitled to retain, although there are trustees competent to sue for the corpus of the fund in which she has a life interest. In any case I should have felt bound to follow the decision of the Court of Appeal, but I thought it right, as this point was raised, and counsel were so good as to look into the matter so fully in the Record Office, to say I do not think this case of *Loomes* v. *Stotherd* (1) can now be regarded as an authority for the proposition for which it was cited.

Solicitors: *Robbins, Billing & Co., for Forrester & Moir, Malmesbury; A. F. & R. W. Tweedie.*

(1) 1 S. & S. 458; 1 L. J. (O.S.) (Ch.) 220; 24 R. R. 209.

W. C. D.

COZENS-HARDY J.

1900

Nov. 20.

In re LEEDS GRAMMAR SCHOOL.

[1900 L. 085.]

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 80—*Charity Land — Compulsory Sale — Payment into Court — Interim Investment—Costs.*

The price of charity land taken compulsorily by a corporation was settled by arbitration. The corporation, after tendering the purchase-money to the official trustees of charitable funds, paid it into court. The corporation was ordered to pay the costs of a petition for investment.

THIS was a petition by the governors of Leeds Grammar School for interim investment of 37,000*l.* paid into court by the Leeds Corporation as the purchase-money and compensation for land taken or injuriously affected under compulsory powers in respect of a street improvement. The amount had been determined by arbitration. The corporation tendered a conveyance by the official trustee of charity lands, to which the governors of the school and the official trustees of charitable funds were made parties—the latter for the purpose of receiving and giving a discharge for the purchase-money under the order of the Charity Commissioners. The Charity Commissioners required the money to be lodged in court. The corporation paid the money into court as, under s. 76 of the Lands Clauses Consolidation Act, in the case of a party refusing to convey.

Vernon Smith, Q.C., and *Austen-Cartmell*, for the petitioners. We ask for the usual order that the costs included in s. 80 of the Lands Clauses Act should be paid by the corporation. The money was paid in, as under s. 76, it being alleged that there was a wilful refusal to receive the purchase-money. It can make no difference to the rights of the parties that the money was paid in as under the wrong section. It is alleged on the part of the corporation, that though the governors of the school the parties selling are under disability, in some way there are parties who could carry out the sale. If that were so, it would

not take the case out of the ordinary practice. In *In re Pigott and Great Western Ry. Co.* (1), where a tenant for life had sold, and trustees had power of sale, it was held that money was properly paid into court, and the railway company could not insist on getting the sale carried through by the trustees under their power.

O. L. Clare, for the corporation. It is a harsh and unjust thing for the parties and the Charity Commissioners to put the corporation to the unnecessary expense of the costs of a petition if it can be avoided; there is no doubt that, with the consent of the Charity Commissioners, the money could have safely been received and a valid conveyance executed. I contend there has been a wilful refusal to receive the purchase-money within the meaning of ss.. 76 and 80 of the Lands Clauses Act, and the Court will not saddle the corporation with these unnecessary costs.

COZENS-HARDY J. It seems to me that this is simply the case of a party under disability selling at a price fixed by arbitration. But it is said, on the part of the corporation, "This is not that case at all; we tendered the full amount of the purchase-money to the official trustees of charitable funds, and the conveyance for execution by the proper parties. With the consent of the Charity Commissioners, they could and ought to have received the purchase-money, and, after refusal, we were entitled to treat the vendors as persons refusing to convey under s. 76 of the Lands Clauses Act, 1845." The governors never did refuse to accept the money; they were persons who could not accept it. Nor do I think the official trustees were under any obligation to accept the money, the effect of which would have been to cast some greater burden on the charity estate. I must make an order in common form that the corporation do pay the costs.

Solicitors: *Patersons, Snow, Bloxam & Kinder, for J. C. Atkinson, Leeds; Vincent & Vincent, for the Town Clerk, Leeds.*

(1) (1881) 18 Ch. D. 146.

D. P

COZENS-HARDY J.

1900

Nov. 24.

In re RENDELL.
WOOD *v.* RENDELL.

[1900 R. 603.]

Administrator—Attorney—Distribution of Assets.

Letters of administration of the estate of a person who died in England were granted to the attorney of the widow, a resident in America, who was not legal personal representative of the deceased in any country:—

Held, that the principal could not give a discharge to the attorney, and the attorney was responsible for the due distribution of the assets.

THOMAS RENDELL died intestate in England, leaving a widow, the defendant to this summons, and some children, all resident in the United States of North America.

The plaintiff had as attorney to the defendant taken out letters of administration of the estates of the deceased. He had taken the usual oath to administer according to law. The material part of the grant of administration was: "And be it further known that at the date hereunder written letters of administration of all the estate which by law devolves to and vests in the personal representative of the said intestate were granted by Her Majesty's High Court of Justice at the Principal Probate Registry thereof to Richard Wood the lawful attorney of Elizabeth Rendell (who now resides in the United States of America) the lawful widow and relict of the said intestate for her use and benefit and until she shall apply for and obtain letters of administration of the said estate of the said intestate."

The defendant was not constituted the legal personal representative of the deceased in the United States or elsewhere.

The plaintiff had got in the personal estate of the deceased, and paid all debts and funeral and testamentary expenses.

The object of the summons was to obtain the decision of the Court whether the plaintiff could safely hand over the property of the deceased come to his hands to the defendant widow, or whether it was his duty himself to distribute it among the next of kin according to law.

The summons also asked for the determination of the domicil of the deceased, which was in the result held to be English.

Douglas, for the plaintiff, on the first question, was stopped by his Lordship.

T. L. Wilkinson, for the widow. There is no case exactly in point. *De La Viesca* v. *Lubbock* (1) seems to apply in principle. There a temporary judicial administrator had been appointed, pending litigation, by a Spanish Court. Sir J. W. Lubbock, as the attorney of the judicial administrator, had been appointed administrator in England limited to power to receive a particular sum. The Vice-Chancellor held that the attorney was bound by the recitals in the letters of administration that he was attorney, and, being merely attorney, could safely pay over to his principal what he had received.

Two cases may be relied on on the other side: one, *Chambers* v. *Bicknell* (2), where it was held that a person who had a grant of letters of administration as attorney could be sued by beneficiaries. That of itself does not shew that if he had paid the money in hand to his principal that the payment would not have been a defence. Here the beneficiaries are in America. The most convenient course would be to hand the assets over to the widow, who is in America, to distribute. The other case is *In re Dewell.* (3). The decision was not in point, but there are some remarks of Kindersley V.-C. in reference to *Chambers* v. *Bicknell* (2) which ought to be called to the attention of the Court.

COZENS-HARDY J. This is a case of some importance, but not of much difficulty. The plaintiff is a person who has been constituted by the Probate Division administrator of the estate of the deceased. He has taken an oath in common form to administer according to law all the estate of the deceased. The letters of administration were granted to him, it is true, as lawful attorney of the defendant, who in the character of his principal, if she came here, could obtain administration.

(1) (1840) 10 Sim. 629. (2) (1843) 2 Hare, 536.
(3) (1858) 4 Drew. 269.

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She is not the legal personal representative of the deceased either in the United States or elsewhere. Until she takes out administration she can only claim here as a person beneficially entitled to a share of the estate of the deceased. Her position, as widow of the deceased, is that there is no portion of the property of the deceased in England or elsewhere for which she can give a good receipt. Can I hold it is the duty of the administrator to hand the assets over to one of the class of persons entitled, who has not clothed herself here or elsewhere with the character of legal personal representative? I think not. The observations of Kindersley V.-C. in the case of *In re Dewell* (1) are in accordance with strict common sense and very much in point. He says, in reference to *Chambers* v. *Bicknell* (2): "That is a clear decision, that the person to whom administration is granted, on the nomination of the party entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claim of other persons"; and again: "When the administrator is once constituted, he is liable to all claims by persons who are entitled to claim against the estate." That being so, in my opinion the plaintiff could not get a good receipt if he handed over the assets to the widow.

Solicitors for both parties: *Atkinson & Dresser.*

(1) 4 Drew. 272.

(2) 2 Hare, 536.

D. P.

PULMAN *v.* MEADOWS.

(Old Suit.)

COZENS-HARDY J.

1900

Dec. 7.

Administration—Retainer.

An executor's right of retainer extends only to funds actually or constructively in his possession.

The insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in court to the credit of another suit. The fund was transferred to the credit of the administration suit, and outstanding costs paid out of it :—

Held, that the present administrator of the deceased, a creditor, had no right of retainer against the balance in court.

A suit of *Dowding* v. *Mellish* was instituted some years previously to 1851 for the administration of the estate of Richard Bradshaw, a testator.

The suit of *Pulman* v. *Meadows* was a creditor's suit commenced by claim (1) filed December 18, 1851, to administer the estate of James Mills, a testator, who died in June, 1851, insolvent.

By the death of Margaret Mellish Mills, sister of James Mills, in June, 1897, the estate of James Mills became entitled to two-eighths of a sum of 201*l.* 5*s.* 8*d.* New Consols in court in the action of *Dowding* v. *Mellish*. The share of James Mills, which amounted after the deduction of costs to 49*l.* 6*s.* Consols, was carried over in the suit of *Dowding* v. *Mellish* to the credit of "the share of James Mills in the residuary estate of Richard Bradshaw, deceased."

Walter Eccleston Bartrum, the applicant in this summons, was now the administrator with the will annexed of the estate of James Mills, and also a creditor of the estate. He was also administrator with the will annexed of the estate of Margaret Mellish Mills. On his application an order was made in the suit of *Dowding* v. *Mellish*, dated November 18, 1899,

(1) [A claim was a summary form of procedure introduced by certain orders of April 22, 1850 (see Headlam's Supplement to Daniell's Chancery Practice, 1851, pp. 200 sqq.), and abolished from February 14, 1860, by the Consolidated Orders of the Court of Chancery (Morgan, Statutes, General Orders, &c., 2nd ed., 1860, p. xlvii.).—F. P.]

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transferring the 495*l.* 6*s.* and a small sum of cash to the credit of *Pulman* v. *Meadows*. Certain old costs in the suit had been taxed. A summons was taken out for payment of these costs with interest out of the fund in court. The judge in chambers ordered the costs to be paid without interest. After the costs were paid a small sum was left in court.

This was a summons for payment out of the money left in court to the applicant, Walter Eccleston Bartrum, on the ground that he was entitled, in exercise of an administrator's right of retainer, to the whole of the fund, which was less than the amount due to him as creditor.

Buckmaster, for Walter Eccleston Bartrum. The legal representative of a deceased debtor is entitled to retain up to the amount of his debt money come to his hands or over which he has control. His right is not defeated either by the fact of an administration order having been made—*Davies* v. *Parry* (1) —nor does it make any difference that the money has been paid into court: *Richmond* v. *White*. (2) The lapse of time before the money falls in cannot affect the right.

Austen-Cartmell, for another creditor. The representative of a deceased is entitled to retain money come to his hands, or which may be said to have constructively come to his hands; beyond that the doctrine of retainer will not be extended: *In re Rhoades* (3); *Trevor* v. *Hutchins*. (4) Here the fund in court could not have been got into the hands of the applicant, and it has been dealt with by an order for payment of costs inconsistently with a right of retainer.

Buckmaster, in reply.

COZENS-HARDY J. This is a case of some difficulty; but, on the whole, I think a right of retainer does not exist. A right of retainer, as the term itself implies, is only applicable to a fund which a legal personal representative has got in. And so Lindley M.R. stated explicitly in the recent case of *In re Rhoades*. (3) That requires some degree of qualification.

(1) [1899] 1 Ch. 602.
(2) (1879) 12 Ch. D. 361.
(3) [1899] 2 Q. B. 347.
(4) [1896] 1 Ch. 844.

The representative may have the fund in his actual possession as money in his own pocket, or he may have it constructively in possession. But if there is neither actual nor constructive possession, a right of retainer, as the very term indicates, can have no existence.

In the present case we are dealing with a very peculiar state of circumstances. [After stating the facts, his Lordship continued :—]

The applicant Bartrum, holding the double capacity of creditor and administrator with the will annexed, applied for an order dealing with the fund standing to the credit of the suit of *Dowding* v. *Mellish* to the separate account of his testator, James Mills. He did not obtain, and I gather did not ask for, payment to himself; and I think there were very good reasons why an order for payment to himself should not have been asked for; it is not the habit of the Court to pay out a fund, under circumstances such as exist here, to a legal personal representative, but inquiries are usually made as to persons beneficially entitled. In this case the Court, finding that there was in existence a suit for the administration of the estate of James Mills, to which the fund belonged, instead of directing inquiries, ordered the fund to be transferred to the credit of this suit. That having been done, some time ago I made an order for the payment of certain costs out of the fund—an order which itself was inconsistent with the right of retainer claimed. The applicant now asserts a right to have the remnant of the fund in court, which is certainly not in his actual possession.

To hold that he has a constructive possession of the fund would, I think, be extending the doctrine of constructive possession further than has yet been done, and I will not be the first to extend it to this length. I think that the true view is that the money never has been got into possession actually or otherwise by the administrator, and that the applicant is not entitled to retain it. It must be divided rateably among all the creditors.

Solicitors: *Lewin & Co.; Fladgate & Co.*

D. P.

COZENS-HARDY J.

1900

Dec. 1, 8.

In re CONSETT IRON COMPANY, LIMITED.

Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 5—*Verbal Alteration.*

The Companies (Memorandum of Association) Act, 1890, does not authorize alterations in the memorandum which merely amplify the description of objects clearly comprised in the original memorandum of association.

THIS was a petition by the Consett Iron Company, Limited, for confirmation of alterations in their memorandum of association enlarging the objects of the company which had been duly resolved upon.

The company was registered in 1864; the definition of the objects of the company in the memorandum of association was as follows:—

"(iii.) The objects for which the company is established are the making, manufacturing, purchasing, selling, and disposing of iron, steel, coke, fire-bricks, and lime, and the working of mines of coal, ironstone, iron ore, fire-clay, and other clays, and of quarries of limestone, freestone, and other stone, and the conversion, sale, and disposal of the produce of all and every such mines or quarries. The doing all such other acts, matters, and things as may be necessary, incidental, or conducive to the attainment of the above objects or any of them."

The scope of the company's business had very much enlarged; the capital of the company had from time to time been greatly increased. There was evidence which satisfied the judge that in the interests of the company it was desirable that they should have power to carry out the proposed new objects, which comprised, among other things, the carrying other persons' goods in the company's ships, and on the company's private railways, and the development for building of land of the company. On the other hand, the proposed section of the memorandum intended to be substituted for the original definition of objects was very long, comprising twenty-one paragraphs, and in the

opinion of the judge much of the language was a mere amplification of the original memorandum of association.

Hon. E. C. Macnaghten, Q.C., and *Elgood*, for the company.

COZENS-HARDY J. It seems to me that to a considerable extent the proposed alterations are merely a repetition of the old objects in inflated phraseology, and relate to matter clearly comprised in the original memorandum. I do not think it is within the scope of the statute simply to improve the language of a memorandum of association—if it be an improvement—by rewriting the memorandum in modern form, and to enable a company to adopt one of Mr. Palmer's modern forms. With this intimation of opinion, the petition had better stand over for a week, that counsel may go through the resolutions and strike out what is superfluous or too wide. Some of the clauses are covered by the words of the original memorandum, and some are too wide.

Dec. 8. The petition was again considered by the Court, and his Lordship sanctioned the following additions to the definition of objects in the original memorandum of association:—

Specific definition of objects in the original memorandum, forming the 1st clause of the new definition, and general words relating to incidental objects, forming the 11th clause; and the following new clauses:—

(2.) To carry on business as shipowners, railway proprietors, carriers by land or water, and farmers.

(3.) To apply for purchase or otherwise acquire any patents, brevets d'invention, and concessions conferring an exclusive or non-exclusive or limited right to use any invention which may seem capable of being used for any of the purposes of the company, or the acquisition of which may seem calculated directly or indirectly to benefit the company, and to use, exercise, develop, grant licences in respect of, or otherwise turn to account the property and rights so acquired.

(4.) To lay out land for building purposes, and to build on, improve, let on building leases, advance money to persons building, or otherwise develop the same in such manner as may seem expedient to advance the company's interest.

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CONSETT IRON COMPANY, LIMITED. *In re.*

(5.) To purchase or otherwise acquire and undertake all or any part of the business, property, and liabilities of any person or company carrying on any business which this company is authorized to carry on.

(6.) To acquire or hold shares in or become members of any company incorporated by special Act of Parliament or under the Companies Acts, and carrying on, whether in the United Kingdom or abroad, any trade or business of a nature or character similar to any trade or business which this company is authorized to carry on, and to acquire shares in or become members of any company or association for insuring the property of the company against damage or loss, or for insuring the company against claims and liabilities arising out of injuries suffered by persons in their service, and to become members of or contributors to the funds of any trade association or union.

(7.) To establish and support, or to aid in the establishment and support of, associations, institutions, schools, or hospitals calculated to benefit employees or ex-employees of the company, or the dependants or connections of such persons, and to grant pensions and allowances and to make payments towards or guarantee money for religious, educational, scientific, charitable, or benevolent objects, or for any exhibition which may seem calculated directly or indirectly to benefit any such persons, or to be conducive to any of the company's objects.

(8.) To enter into partnership or into any arrangement for sharing profits, union of interests, joint adventure, or co-operation with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which this company is authorized to carry on or engage in.

(9.) To promote or aid in promoting any company or companies in which this company is authorized to hold shares.

(10.) To lend money on such terms as may seem expedient to customers of and persons having dealings with the company, and to guarantee the performance of contracts by members of or persons having dealings with the company.

Solicitors: *Rowcliffes, Rawle & Co.*

D. P.

In re GRAY AND OTHERS, SOLICITORS.

COZENS-HARDY J.

1900

Nov. 28; *Dec.* 11.

Solicitor and Client—Costs—Taxation—Lessor and Lessee—Costs of Lease—Preliminary Negotiations—Third Party—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Lessees having obtained the usual third party order to tax the lessor's solicitor's bill of costs in the preparation of a mining lease, took objection to the allowance by the taxing master of certain items for charges for negotiations leading up to the lease, and in particular for fees paid to a mining engineer who had been consulted on behalf of the lessor, and for various correspondence with him. On a summons to review this taxation:—

Held, that the third party order to tax obtained by the lessees did not alter the nature or enlarge the scope of their liability, upon the existence of which the order to tax was based; but that even on a third party taxation the Court was bound to look at the nature of the items, and to consider whether, apart from the order, the applicant was under any liability to pay them; and that the bill must therefore be referred back to the taxing master to revise his taxation.

Though a solicitor may include in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax thereby render himself liable for the whole bill.

In re Negus, [1895] 1 Ch. 73, considered and applied.

SUMMONS to review a taxation of costs.

The question raised by this application was whether the liability of a lessee for the costs of the lease was in any way increased by reason of his having obtained a third party order for taxation, and particularly with reference to the costs of preliminary negotiations.

In 1895 the Delcoath Mine, Limited, were desirous of obtaining a mining lease of some property in Cornwall belonging to a Mr. A. F. Bassett, and in March of that year a correspondence, and negotiations with a view to obtain a lease, were commenced with Mr. Bassett and his advisers, and continued until August, 1899, when the lease and counterpart were executed.

In March, 1900, the usual third party order to tax was obtained under s. 38 of the Solicitors Act, 1843, on the petition

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of the Delcoath Mine, Limited, the lessees, in which it was alleged that the solicitors, Messrs. Bell, Brodrick & Gray, were employed by Mr. A. F. Bassett, as lessor, to prepare a lease of Delcoath Mine to the petitioners; that the said solicitors, on October 26, 1899, delivered unto the petitioners their bill of fees and disbursements amounting to 301*l.* 12*s.* 4*d.*, which the petitioners were liable to pay, but were advised ought to be taxed, and the petitioners submitted to pay what should be due to the said solicitors on the taxation of their said bill.

The taxing master taxed the bill, and made his certificate. The lessees thereupon took objections to the allowance of certain specified items, which it is not necessary to state in detail; they consisted of charges for negotiations leading up to the lease, and in particular the fees paid to a mining engineer who was consulted on behalf of the lessor, and various correspondence with him. The reasons alleged in support of these objections, and dated July 17, 1900, were as follows: (1.) The Delcoath Mine, Limited, being lessees of certain mines, and Messrs. Bell, Brodrick & Gray, being the solicitors for Mr. A. F. Bassett, the lessor thereof, the items complained of consist (*a*) of charges made in respect of advice obtained by the lessor, his solicitors, or agent, for the purpose of enabling the said lessor to formulate the terms to be inserted in the demise of the mines in question, and of fees paid to mineral experts for giving such advice, such items being in part costs of "negotiations"; or (*b*) of charges for the counterpart of the lease. (2.) In the absence of special agreement, a lessee is not under any liability to pay to a lessor any such costs, and no such special agreement exists in this case. (3.) "Although the bill is being taxed at the instance of the lessees, as third parties under s. 38 of the Solicitors Act, 1843, the lessees have not by obtaining the order for taxation become under any greater liability to pay the costs, charges, and expenses of the lessor's solicitors in respect of 'negotiations,' or counterpart of the lease, than they were under prior to obtaining such order." Then followed a schedule, giving in detail the various items in the bill to which exception was taken.

The taxing master's answers, dated July 23, 1900, were as follows: "There are two points involved in this case. (1.) A lessee is by law liable to pay his lessor for the costs of the lease: see *Grissell* v. *Robinson*. (1) These costs are limited to such as are properly incurred in the drawing, settling, and completing the lease, and do not include the costs of the counterpart thereof: see *In re Negus*. (2) In this case the lessee obtains an order to tax the lessor's solicitor's bill under s. 38 of the Solicitors Act, 1843, as a party liable to pay. What is he liable to pay? His liability covers all charges which the lessor is liable to pay his solicitors, in the matter of the lease, as between the solicitor and the party chargeable, and not as between the party liable to pay and the party chargeable. I have taxed the bill on these lines, and the charges allowed are fair and proper, except that I have bowed to the decision in *In re Negus* (2) and taken off the costs of the counterpart which, apart from this decision, I should have allowed as a charge properly payable by the lessor to his solicitor, and also by the third party: *In re Holliday and Godlee*. (3)"

On August 10, 1900, the lessees took out the present summons, asking that the objections of July 17, 1900, might be allowed, and the matter referred back to the taxing master to vary his certificate accordingly.

It was admitted that the scale fee did not apply to a mining lease of this nature.

Eve, *Q.C.*, and *Romer*, for the lessees. Though the lessee only obtains a third party order to tax on the footing that he is bound to pay what is due to the solicitor from his own client, *In re Fyson* (4), *In re Massey* (5), which may be more than the client, had he paid it, could have recovered from the third party, still the third party is only liable to pay the proper costs for preparing, settling, and completing the lease, and the third party rule does not prevent the taxing master from considering the question of the liability of the third party: *In re Negus*. (6)

(1) (1836) 3 Scott, 329; 3 Bing. N. C. 10; 43 R. R. 574.
(2) [1895] 1 Ch. 73.
(3) (1888) 58 L. T. 301.
(4) (1846) 9 Beav. 117.
(5) (1865) 34 Beav. 463.
(6) [1895] 1 Ch. 73, 80.

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The lessees in this case are not liable to pay these fees to mining experts, and these items should be disallowed. *In re Holliday and Godlee* (1), which at first sight is against the lessees, is distinguishable, on the ground that there the only question was whether or not the costs of reference to arbitration were excessive. In that way *In re Holliday and Godlee* (1) can be reconciled with the decision in *In re Negus.* (2) The lessor's solicitor may be entitled to be paid for negotiations leading up to the lease: *Savery* v. *Enfield Local Board* (3); still these fees to mining experts cannot be included under the head of costs of "negotiations" which the lessee is bound to pay. By obtaining a third party order to tax, the lessee does not thereby become liable to pay for the costs of proceedings or other matters which he would not have been liable for had no third party order been obtained: the lessee's common law liability is not to be increased by reason of his having obtained a third party order. The objections should be allowed, and the bill referred back to the taxing master.

[*Ex parte Prickett* (4) was also referred to.]

Vernon Smith, Q.C., and *MacSwinney*, for the lessor's solicitors. The lessees in this case stand in the shoes of the lessor, and are liable for all that he is properly liable to pay. The item in the schedule for the costs of a writ for specific performance we give up; but as to all the other items the taxing master is right. These fees were properly authorized by the lessor, and had he paid them he would have recovered them from the lessees: *Grissell* v. *Robinson.* (5) These fees were part of the negotiations which the lessor's solicitor was entitled to be paid: *In re Martin* (6); *In re Carthew* (7), which seems to be in conflict with *In re Negus.* (2) The scale fee covers costs of negotiations in relation to the granting of the lease: *In re Field* (8); *In re Emanuel and Simmonds* (9); *Savery* v. *Enfield Local Board.* (3) Why should the lessee

(1) 58 L. T. 301.
(2) [1895] 1 Ch. 73.
(3) [1893] A. C. 218.
(4) (1818) 3 Swans. 130.
(5) 3 Scott. 329; 3 Bing. N. C. 10; 43 R. R. 574.
(6) (1889) 41 Ch. D. 381.
(7) (1884) 27 Ch. D. 485.
(8) (1885) 29 Ch. D. 608.
(9) (1886) 33 Ch. D. 40.

escape the liability for negotiations because the scale does not apply and an item bill has to be delivered? *In re Holliday and Godlee* (1) is exactly in point, and there is nothing in *In re Negus* (2) which prevents its application to this case. *Humphreys* v. *Jones* (3) is also in our favour. The lessor could not have safely granted this lease without the advice of a competent mining expert, and for this the lessee is liable just as much as the lessor.

Romer, in reply. The cases relied on by the lessor's counsel as to the scale fee do not decide that in an ordinary case the words "preparing and settling and completing" a lease include special negotiations or special fees like this, but only that the solicitor cannot charge a fee for "negotiations" in addition to the scale fee. The lessees were not liable to pay these special fees, and by obtaining a third party order to tax they have not thereby increased their liability.

Cur. adv. vult.

Dec. 11. COZENS-HARDY J. This is an application to review a taxation which raises a question of importance and difficulty. The material facts may be shortly stated. [His Lordship having stated the facts as above, and having read the objections and the taxing master's answers, continued:—]

It is necessary to consider first what is the position of a lessee at common law with reference to the costs of a lease, and then how far, if at all, that position is altered by reason of an order to tax having been obtained by the lessee under s. 38 of the Solicitors Act, 1843.

Now, it was decided in 1836 in *Grissell* v. *Robinson* (4) that a lessor who has paid his own attorney his charges for drawing a lease can recover the money from the lessee as money paid by the lessor to the use of the lessee. Evidence was there given that it is the custom for the lessor's attorney to prepare the lease at the expense of the lessee.

Jennings v. *Major* (5) has been treated by text-writers as a

(1) 58 L. T. 301.
(2) [1895] 1 Ch. 73.
(3) (1885) 31 Ch. D. 30.
(4) 3 Scott, 329; 3 Bing. N. C. 10; 43 R. R. 574.
(5) (1837) 8 C. & P. 61.

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decision that the lessor must pay for a counterpart of the lease, if he requires one, unless the lessee has expressly agreed to pay for it. And in *In re Negus* (1) Chitty J. held that a lessee is under no liability to the lessor in respect of charges for the counterpart.

In *Lock* v. *Furze* (2) it was asserted by counsel (3) that fees to counsel and surveyors are never allowed. The reporter adds that the Court intimated a doubt about it, and it was arranged that the 65*l.* expenses should be reduced by 20*l.*, which appears (4) to have been the exact amount of those fees. The question did not, therefore, arise for decision; but Erle C.J. says (5): "Of this sum it is agreed that 20*l.* shall be deducted, as the amount of counsel's and surveyors' fees, which are never allowed." I doubt whether this dictum is in accordance with existing usage, so far as counsel's fees are concerned. On principle the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease. In a case where the aid of a skilful conveyancer is reasonably required in settling the draft lease, I think the lessee ought to be liable to pay his fees: see *Helps* v. *Clayton* (6), where the liability of a husband to pay the costs of a marriage settlement is discussed, and *Nicholson* v. *Jeyes*. (7)

I think, therefore, that if the lessor had paid his solicitors and sued the lessee, he could not have recovered anything antecedent to instructions for lease, and in particular could not have recovered the fees of the mining expert. This is in accordance with the law as between mortgagor and mortgagee, for in the absence of a special bargain the costs of a valuation of the property with a view to the loan are not allowed in taking the mortgage accounts: *Field* v. *Hopkins*. (8)

It remains to consider what difference is made when the lessee elects to tax under the third party clause. Now, it is well settled that the bill to be taxed is the bill between the

(1) [1895] 1 Ch. 73.
(2) (1865) 19 C. B. (N.S.) 96.
(3) Ibid. 115.
(4) Ibid. 101.
(5) 19 C. B. (N.S.) 119.
(6) (1864) 17 C. B. (N.S.) 553, 568.
(7) (1853) 22 L. J. (Ch.) 833.
(8) (1890) 44 Ch. D. 524.

solicitor and his own client; and that the third party can only tax it on the condition of paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party: see *In re Fyson* (1); *In re Massey*. (2) If, for example, in a case to which the scale fee would be applicable, the client makes an agreement with the solicitor under s. 8 of the Act of 1881 that an item bill shall be delivered, I think the third party cannot complain. He must tax on the footing of the agreement.

A strong illustration of this principle is found in the case of *In re Holliday and Godlee*. (3) There a local board agreed to purchase a piece of land at a price to be determined by arbitration, and the agreement contained a clause that the board should pay to the vendors all the costs of the agreement and of the reference to arbitration, and of deducing and evidencing the title and the assurance to the board, such costs to be paid on the basis of Sched. II. to the general order, and not on the basis of Sched. I. The arbitration took place; the price was fixed and the property conveyed. The vendors' solicitors sent their bill of costs to the local board, and the usual third party order for taxation was made. Objections were taken to a number of payments made to surveyors and mining engineers who had been called as expert witnesses. The local board objected that the payments were excessive and unreasonable. The solicitors answered that the witnesses were called and the payments were made with the approval of the vendors. North J. held that the taxing master had taxed the bill properly, having regard to the order which had been made, on the ground that as between the vendors and the solicitors all the payments had been authorized. "It is urged," he said, "that it is a great hardship on the purchasers to be obliged to pay any costs which the vendor chooses to authorize. The answer to that is, that the 'costs of reference' mentioned in the agreement mean costs properly incurred; the purchasers are not bound to pay more, but if the vendors demanded more the proper course for the purchasers was either to refuse to pay

(1) 9 Beav. 117. (2) 34 Beav. 463.
(3) 58 L. T. 301, 303.

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and await an action by the vendors, or to have the bill of costs referred to an expert for arbitration." It follows, therefore, that with respect at least to any piece of business properly inserted in the bill which the third party is liable to pay, it is not open to the third party to object that payments sanctioned by the client are excessive.

In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The master has also struck out from the bill the costs relating to the counterpart lease, although such costs were clearly proper as between the solicitors and their client.

How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think the true view is that the third party order does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based. This view is supported by Chitty J.'s judgment in *In re Negus*. (1) In that case there was an agreement for a lease not containing any express agreement by the lessee to pay the costs. A bill was delivered by the lessor's solicitors, and an order for taxation was obtained under the third party clause. Chitty J. held that the scale fee should apply, but that, as the scale fee included the cost of a counterpart lease, which the lessee was not liable to pay, a deduction ought to be made from the scale fee. Chitty J. deals with this point as follows (2): "The other point remains, viz., that this is a third party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the taxing master from considering the question of the liability of the third party. This has been decided, and, by way of illustration, I may refer to *In re Brown*. (3) The trustee in that case was liable, as between himself and the solicitor

(1) [1895] 1 Ch. 73. (2) [1895] 1 Ch. 80.
(3) (1867) L. R. 4 Eq. 464.

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who was defending his bill as against the cestuis que trust, for the items impeached; but Lord Romilly held that those items were properly disallowed by the taxing master because they could not have been charged as against the trust estate. The solicitor had pointed out to the trustee, as was his duty, that he would not be allowed to charge; but still the trustee insisted upon the work being done, and yet these items were struck out from the bill when it was taxed by a third party. Now it is part of the general law (though it is unnecessary to go into the authorities) that in the case of lessor and lessee, the lessee is not bound to pay for the counterpart, and the scale fee prescribed by Sched. I., Part II., includes the counterpart; the words in Sched. I. are, 'Lessor's solicitor for preparing, settling, and completing lease and the counterpart,' and the decisions upon these rules generally shew, that the business contemplated by the rules must be wholly performed by the solicitor in the transaction, in order to make the scale remuneration apply. There was a counterpart in this case, and it is plain that the landlord was liable to his solicitor to pay for this counterpart; the taxing master in applying the scale, as he did, according to the amount of the rent, has necessarily included the charge for the counterpart, in respect of which there is no liability on the part of the tenant to the landlord; consequently, it was argued for the tenant, that the scale could not apply on this third party taxation. In my opinion that argument cannot be sustained, for these rules having—as has been well explained by Lord Halsbury in the case of *Savery* v. *Enfield Local Board* (1)—been made for the purpose of preventing disputes on taxation and providing some guidance as to the mode in which charges should be made, prescribed and fixed a gross sum for each document prepared, which could be known beforehand to any person able to employ a solicitor; and I cannot conceive it to have been the intention of the framers of the rules that whilst the landlord had to pay, say a minimum 5*l.* to his solicitor, still the solicitor might be entitled to charge 10*l.* or 20*l.* on the non-scale system as against the lessee. My opinion is that this

(1) [1893] A. C. 225.

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contention cannot prevail, and I think the taxing master was right in taxing this bill in the manner he has done, as being the bill that the landlord has to pay. There is a novelty in the point about the counterpart, and I think that the only solution of this supposed difficulty that is reasonable and right is this—that the taxing master should tax, as he has done this bill, as he would have taxed it as between the solicitor and landlord, viz., on the scale footing, and then seeing that the tenant was only liable for the preparing, settling, and completing the lease, he should have made a reasonable deduction from the scale in respect of the counterpart. The parties here have been very reasonable, and they do not require me to send the bill back to the taxing master upon this small point: they have agreed that 5*s*. for the stamp duty on the counterpart, and 18*s*. in respect of the proper costs in relation to the counterpart, as distinct from the lease itself, should be deducted from the amount which the third party taxing has on the present taxation to pay."

In re Negus (1) has been followed by the taxing master, somewhat unwillingly, so far as the counterpart is concerned. But every word of the judgment seems to me to apply equally to the fees of the mining expert which he has allowed. The governing idea of Chitty J.'s judgment is that even on a third party taxation the Court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax. In the present case the petition only alleged that the solicitors were employed by Mr. Bassett as

(1) [1895] 1 Ch. 73.

lessor "to prepare a lease," and the submission to pay contained in the order must be limited to what properly results from such employment.

I have carefully considered several cases which have arisen under express contracts to the lessee to pay the lessor's costs, and the application of the scale to such circumstances: *In re Field* (1), *In re Emanuel and Simmonds* (2), *Savery* v. *Enfield Local Board* (3), and *In re Horn and Francis* (4), but I have not derived much help from them. They only decided what business was covered by the scale fee. They did not raise the question which presents itself in the case with which I have to deal.

The result is that the bill must be referred back to the taxing master to review his taxation in respect of the scheduled items. The respondents must pay the costs of the application.

Solicitors: *Robbins, Billing & Co., for Daniell & Thomas, Camborne*; *Bell, Brodrick & Gray.*

(1) 29 Ch. D. 608.
(2) 33 Ch. D. 40.
(3) [1893] A. C. 218.
(4) [1896] 2 Ch. 797.

W. C. D.

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Dec. 5, 12.

In re THE STENOTYPER, LIMITED. HASTINGS BROTHERS *v.* THE STENOTYPER, LIMITED.

[1900 S. 954.]

Company — Winding-up — Fraudulent Preference — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28 (*repealed*), 48.

Sect. 164 of the Companies Act, 1862, although it uses the words "undue or fraudulent preference," does not extend the operation of the fraudulent preference clause (s. 48) of the Bankruptcy Act, 1883, which is thereby applied to companies being wound up under the Companies Acts.

Within three months before the commencement of its winding-up a company was indebted to H., and was to the knowledge of its directors unable to pay its debts as they became due from its own moneys. The chairman of its directors was personally liable on an acceptance of the company for part of the debt due to H. In pursuance of a scheme resolved upon by the directors with the very object of relieving the chairman from his liability, debentures of the company were allotted to H. as a collateral security for his debt:—

Held, that the transaction was not a fraudulent preference, and that the debentures were valid.

The Stenotyper, Limited, was incorporated in 1897, and its articles of association empowered its board of directors to raise capital or borrow money on the security of mortgage debentures, either at par or at a premium.

On February 17, 1900, the company owed to Hastings Brothers, Limited, the plaintiffs in the present action, 640*l.* 5*s.* 8*d.*, part of which was secured by an acceptance of the company upon which N. E. Reed, the chairman of its board of directors, was personally liable; and a meeting of the directors was held on that day at which the following directors were present, N. E. Reed (chairman), C. C. Hore, and C. C. H. Millar, and the proceedings at the meeting, according to an entry in the minute-book, were as follows:—

"The chairman reported that himself and the secretary had an interview yesterday . . . . with Messrs. Hastings Brothers in reference to the company's acceptance in their favour for

371*l.* 17*s.* 8*d.*, due this day, and notified to them the inability of the company to meet the same. Messrs. Hastings Brothers refused to refrain from taking legal proceedings at once to recover that amount and the additional amount of 278*l.* 8*s.* which had not been drawn for (making a total of 640*l.* 5*s.* 8*d.* (*sic*)), except on the following conditions:—

"1. That two bills, one at one month and one at two months, in equal parts, for the whole amount of their claim be forthwith given to them.

"2. That these bills be personally indorsed by Mr. N. E. Reed.

"3. That Mr. N. E. Reed should personally give them a bonus for thus extending the time for payment for the amount due to them from the company.

"4. That first mortgage debentures for a sum of 700*l.* be likewise issued to them forthwith by the company as collateral security for payment of their debt.

"An approximate statement of the present liabilities of the company was presented, shewing the position of the company to be as follows." [Particulars were here inserted shewing total liabilities to the extent of over 4000*l.*, including 876*l.* 11*s.* 3*d.* for "present liabilities on account of which proceedings have been taken or threatened."] "The company requiring Mr. N. E. Reed to guarantee the bills of Messrs. Hastings Brothers, as aforesaid, and to personally advance the amount of bonus if desired by them for the extension of time (which was agreed to be 300 fully-paid shares of five dollars each in the Stenotyper of America at a total face value of, in English money, 300*l.*), also desiring that he advance a further sum of money not exceeding 500*l.*, and the foregoing facts having been laid before and duly considered by the solicitor to the company present, and he having expressed his opinion that the issue of these debentures would not be an undue preference, it is hereby resolved:—1. That first mortgage debentures to the amount of 700*l.* be issued forthwith to Messrs. Hastings Brothers, Limited, as collateral security for the payment of their debt. 2. That first mortgage debentures be issued to the said Mr. N. E. Reed for (*a*) the amount of moneys now due to

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him from the company for previous advances and his liability on the company's account for rent; (*b*) to cover all such further advances made by him as and when made; (*c*) first mortgage debenture bonds to the amount of 400*l.* to cover his personal liability to Mr. C. C. Hore for moneys advanced to the company. Mr. N. E. Reed having declared his interest in the above resolution, he did not vote upon the same."

The Court found that the statement as to refusing to refrain from proceedings was untrue.

At this time the company's bank balance was only 1*l.* 2*s.* 3*d.*, and its directors knew that it was unable to pay its debts as they became due from its own moneys.

The debentures were sealed on February 20, in pursuance, as the Court found, of a scheme resolved upon by the directors with the very object of relieving N. E. Reed from his liability, and not with a view to give the plaintiffs a preference.

A winding-up petition was presented against the company on March 5, and on March 21 a winding-up order was made on the petition.

In a debenture-holders' action brought by Hastings Brothers, Limited, the plaintiffs by summons claimed a declaration that the debentures issued to them were valid and subsisting, and that they were entitled to the benefit of the charge on the defendant company's property created thereby.

The summons was adjourned into Court and heard by Cozens-Hardy J., sitting for Wright J., on December 5, 1900.

C. T. Mitchell, for the plaintiffs. It will be contended that the motive of the company was to prefer the plaintiffs; and that the preference was fraudulent. It is not enough to shew that what was done was with the view of benefiting one of the directors.

Where directors had guaranteed their company's debt to its bankers, and two days before the commencement of the winding-up paid up in advance the shares they held in the company with a view to reducing the debt to the bank and in order to relieve themselves from liability, it was held that there was no fraudulent preference: *Poole, Jackson and Whyte's*

Case. (1) Sect. 164 of the Companies Act, 1862, incorporates the bankruptcy law for the time being, and that is now contained in s. 48 of the Bankruptcy Act, 1883.

To establish a fraudulent preference within that section it is not sufficient to shew that the creditor was in fact preferred; it must also be shewn that the dominant motive of the bankrupt was to prefer the creditor, and, therefore, where the motive is to save the bankrupt from criminal prosecution, the case is not within the section: *Ex parte Taylor* (2); *Sharp* v. *Jackson.* (3) The case last cited also shews that, as regards pressure, the old law, as existing before the Bankruptcy Act, 1869, is still in force. And when the bankrupt's motive, in doing something which in the result gives a creditor a preference, is to prevent another person who has become a surety for the bankrupt from being compelled to pay, the transaction is not a fraudulent preference: *In re Mills.* (4) That decision is directly in point, and was followed in *In re Warren.* (5) If there are two or more motives for the transaction, no fraudulent preference is shewn unless the main or chief motive was to prefer the creditor. In the present case the company had no intention to prefer any one; it hoped to be able to go on with its business. [He also referred to *Ex parte Topham.* (6)]

Herbert Reed, Q.C., and *Stewart-Smith*, for the defendant company and the official receiver and liquidator. All the Court has to do, in deciding whether there has been a fraudulent preference, is to discover what was the company's substantial, effectual, or dominant view in the transaction, and that need not be the sole view: *Ex parte Hill.* (7) The company's dominant view was to prefer the plaintiffs. It is immaterial that the persons preferred are acting bonâ fide. In each case it is a question of fact—namely, was the substantial or principal view of the debtor to prefer a particular creditor? This company had no prospect of doing anything by giving the plaintiffs security except that of preferring them. Nor was there any

(1) (1878) 9 Ch. D. 322.
(2) (1886) 18 Q. B. D. 295.
(3) [1899] A. C. 419, 422, 423.
(4) (1888) 5 Morr. 55.
(5) [1900] 2 Q. B. 138.
(6) (1873) L. R. 8 Ch. 614.
(7) (1883) 23 Ch. D. 695.

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pressure influencing or likely to influence the directors, or anything in the nature of pressure to prevent the transaction being a fraudulent preference: *Ex parte Hall.* (1) The expression "undue or fraudulent" preference in s. 164 of the Companies Act, 1862, is larger than the term "fraudulent preference" in s. 48 of the Bankruptcy Act, 1883. When the Act of 1862 was passed the doctrine of "fraudulent preference" had been established by the Courts, but there was no statutory definition of the term, and a preference may be undue although it is not fraudulent: Bankruptcy Act, 1883, s. 28 (now repealed by s. 29 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71)); *In re Skegg.* (2)

[They also referred to *Ex parte Read.* (3)]

Mitchell, in reply. In *Ex parte Hall* (1) the so-called pressure was invited by the debtor. If it is necessary to shew pressure in the present case, it is submitted that a refusal to refrain from immediate legal proceedings is pressure.

Sect. 164 of the Act of 1862 merely embodies, as part of the law of winding up companies, the bankruptcy law for the time being as to fraudulent preference, and the addition of the words "undue or" does not extend the doctrine in the case of companies.

[*Frank Evans* (amicus curiæ) referred on this point to *In re Washington Diamond Mining Co.* (4)]

Cur. adv. vult.

Dec. 12. COZENS-HARDY J. This is a summons seeking a declaration that seven debentures dated February 20, 1900, issued by the defendant company to the plaintiffs, are valid. The official receiver and liquidator opposes on the ground that the debentures are void under s. 48 of the Bankruptcy Act, 1883. The language of that section, so far as is material, is as follows: "Every . . . . charge . . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor, ... with a view of giving such creditor a preference over the other creditors shall, if the person making the" charge "is adjudged bankrupt on a

(1) (1882) 19 Ch. D. 580.
(2) (1890) 25 Q. B. D. 505.
(3) [1897] 1 Q. B. 122.
(4) [1893] 3 Ch. 95, 100, 111, 113.

bankruptcy petition presented within three months . . . . be deemed fraudulent and void as against the trustee in the bankruptcy." This section is made applicable to companies by s. 164 of the Companies Act, 1862. I think it is plain that that section, although it uses the words "undue or fraudulent preference," does not extend the operation of s. 48. Now it has been decided by authorities which are binding upon me that a transaction is not void under s. 48 if it is entered into to protect the debtor himself, or for the benefit of some third person, such as a surety. The view of giving the particular creditor a preference must be the guiding and main motive operating upon the mind of the debtor.

Now the material facts are these: The plaintiffs, who are advertising agents, became creditors of the company for a total amount of 640*l.*, part of which was secured by an acceptance of the company upon which Mr. Reed, the chairman, was liable. At this date the balance at the company's bank was practically nothing. The company was known by the directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. The debentures in question were issued by the company pursuant to resolutions passed at a board meeting on February 17, 1900. [His Lordship read the entry in the minute-book with reference to the meeting, and said that so far as it stated that the plaintiffs had refused to refrain from taking legal proceedings it was false, and continued:—]

It is impossible to read those resolutions without seeing that a scheme was resolved upon by the directors for the very object of relieving Mr. Reed from his liability. That I am convinced was the main motive of the transaction. Although, incidentally, Messrs. Hastings, the plaintiffs, would get the benefit of the charge, the charge was not given with a view to give them a preference. The Court is bound to look at the motive and not at the result. The case seems to me to be governed by the decision of the Court of Appeal in *In re Mills*. (1) I therefore hold that there is nothing to impeach the validity of the debentures.

(1) 5 Morr. 55.

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1900
THE STENOTYPER, LIMITED, *In re.*
HASTINGS BROTHERS *v.* THE STENOTYPER, LIMITED.

In the view which I take it is not necessary for me to consider whether there was any such pressure on the part of the plaintiffs as would suffice to take the case out of s. 48. The applicants must add their costs of this summons to their security. The costs of the respondents will be costs in the winding-up.

Solicitor for plaintiff company: *S. J. R. Stammers.*
Solicitors for defendant company: *Everett & Hodgkinson.*

F. E.

COZENS-HARDY J.
1900
Dec. 19.

KNIGHT *v.* WILLIAMS.

[1900 K. 700.]

Lease—Surrender—Title Deed—Custody.

On the surrender of a term and the grant of a longer term to the same lessee, the lessee is entitled to retain the original lease.

THIS was a lessor's action for the specific performance of a contract for the surrender of a lease not quite expired, and the grant of a new lease for twenty-one years. The only dispute between the parties was as to the right to the custody of the old lease. The lessor insisted on a right to have it delivered over to him. The lessee insisted on either retaining the lease or receiving the counterpart in exchange. The facts are stated in more detail in the judgment.

Eve, Q.C., and *St. John Clerke*, for the plaintiff. It is reasonable that at the expiration of a lease the landlord should be entitled to the lease and also the counterpart, for together they form part of his title: Coke on Littleton, p. 229*a*; Dixon on Title Deeds, p. 82; *Doe* v. *Pulman* (1); Copinger on Title Deeds, pp. 34, 35; Platt on Leases, vol. ii. p. 541. The landlord here is taking a surrender, and is therefore in the position of assignee of the lease and entitled to the document.

(1) (1842) 3 Q. B. 622.

Stewart-Smith, for the defendant. Where the lease is determined by re-entry, or otherwise than by expiration of time, the lessee is entitled to keep the document: *Hall* v. *Ball* (1); *Elworthy* v. *Sandford*. (2)

Eve, *Q.C.*, in reply.

COZENS-HARDY J. The plaintiff was, in March, 1900, the reversioner of some house property of which the defendant held a lease expiring at March, 1901, at a yearly rent of 90*l*. In March, 1900, the plaintiff agreed to accept a surrender of the defendant's lease and to grant him a new lease for a term which would expire in 1920, at a rent of 140*l*. The lease and counterpart were prepared and engrossed, and they were executed by the plaintiff and defendant respectively; but on the appointment for completion the plaintiff declined to deliver the new lease unless the defendant would hand over his present lease. The defendant said he would not object to do this if the plaintiff would hand over the counterpart of the present lease, but otherwise he refused. Upon this point alone the parties broke off, and an action was commenced for the purpose of deciding this sole question.

It was stated by counsel that the new lease prepared and executed by the plaintiff was not expressed to be made in consideration (inter alia) of the surrender of the former lease; but in the view which I take the insertion or omission of these words would make no difference: see *Doe* v. *Courtenay*. (3)

The acceptance of a new lease operates as an implied surrender "by operation of law" of the old lease within the meaning of s. 3 of the Statute of Frauds, but such surrender differs from an actual surrender by deed: it is not absolute; it is subject to an implied condition that the new lease is good, and if this is not so the old lease remains in force. The authorities on this point are clear: see Woodfall's Landlord and Tenant, 16th ed. p. 318. This being so, I think the plaintiff is wrong in contending that he is in the position of an ordinary purchaser of a lease who can on completion demand

(1) (1841) 3 Man. & G. 242. (2) (1864) 3 H. & C. 330.
(3) (1848) 11 Q. B. 702.

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1900

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the handing over of the lease, and is at liberty to burn it if he thinks fit. The lessee, notwithstanding a surrender by operation of law, retains an interest in the lease. Moreover, when a term is determined by re-entry, or has expired by lapse of time, the lessor is not entitled to recover the lease: see *Hall* v. *Ball* (1) and *Elworthy* v. *Sandford*. (2) It would, I think, be wrong to put it out of the power of the defendant to take advantage of the old lease should the new lease prove to be invalid, and he is therefore entitled to retain the old lease.

On the other hand, the defendant cannot require the handing over of the counterpart lease, and he does not assert this as a right, though he was willing on completion to hand over the lease if he got the counterpart.

The result is that in my opinion the defendant was not bound on completion to hand over the old lease, and I therefore make no order except that the plaintiff do pay the costs of the action.

Solicitors: *W. T. Boydell*; *Morley, Shirreff & Co.*

(1) 3 Man. & G. 242. (2) 3 H. & C. 330.

D. P.

FARWELL J.
1900
Dec. 11.

In re WALKER. SUMMERS *v.* BARROW.

[1900 W. 2595.]

Trustee—Appointment—Absence Abroad—Trustee Act, 1893 (56 & 57 *Vict.* *c.* 53), *s.* 10, *sub-s.* 1.

One of two trustees purported to appoint a new trustee in the place of his co-trustee under the power in that behalf conferred by sub-s. 1 of s. 10 of the Trustee Act, 1893, on the ground that the co-trustee had resided abroad for more than twelve months. The co-trustee had remained out of the United Kingdom for more than twelve months, except for one week when he was in London:—

Held, that the event upon which the power arose had not happened and that the appointment was bad.

THIS was an originating summons to determine who were the present trustees of the will of John Walker, deceased, dated August 1, 1879.

The will contained no provision as to the appointment of new trustees.

Prior to June, 1900, the existing trustees of the will were the plaintiff and the defendant Mrs. Walker.

By an indenture dated June 1, 1900, which recited that the plaintiff in or before the month of April, 1899, went to reside abroad and had ever since remained abroad, Mrs. Walker, in pursuance of the power of appointing new trustees conferred by s. 10 of the Trustee Act, 1893, purported to appoint the defendant Barrow to be a trustee of the will in the place of the plaintiff.

It appeared that the plaintiff went abroad in the spring of 1899, and had not since been in the United Kingdom except for one week in November, 1899, when he stayed in London, and called upon the trustees' solicitor with reference to certain matters connected with the trust.

H. Fellows, for the plaintiff. The plaintiff has not remained out of the United Kingdom for more than twelve months

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within sub-s. 1 of s. 10 of the Trustee Act, 1893, and the appointment of June 1, 1900, is therefore invalid.

Upjohn, Q.C., and *Christopher James*, for the defendants. A mere temporary presence in the United Kingdom is not sufficient to oust the provision. The Act ought not to be construed with absolute literalness. In substance there has been a residence abroad by the plaintiff for more than twelve months. This mode of interpretation has been adopted by Sir J. Romilly in the case of a similar clause in a deed: *In re Moravian Society* (1); and see *In re Arbib and Class's Contract.* (2)

FARWELL J., after referring to sub-s. 1 of s. 10 of the Trustee Act, 1893, continued as follows:—In this case the plaintiff was out of the United Kingdom for more than twelve months prior to June 1, 1900, the date of the deed whereby Mrs. Walker purported to appoint someone else in his place, with the exception of one week in November, 1899, during which he attended at the office of the trustees' solicitors and transacted part of the business of the trust. Before the section can apply, I have to find as a fact that he did remain out of the United Kingdom for more than twelve months prior to the deed; but inasmuch as he did not, I can only answer the question raised by the summons by saying that the power of appointing new trustees did not arise, and that the plaintiff and the defendant Mrs. Walker are the present trustees of the will.

Solicitors: *Stibbard, Gibson & Co.; Druces & Attlee.*

(1) (1858) 26 Beav. 101. (2) [1891] 1 Ch. 601, 611, 613.

H. B. H.

JACOBS *v.* MORRIS.

FARWELL J.

[1899 J. 1799.]
[1899 J. 2053.]

1900

Dec. 5, 6, 12, 13.

Principal and Agent—Power of Attorney—Construction—General Words—Ejusdem generis—Borrowing—Excess of Authority—Money had and received.

The plaintiff, who traded in Australia under a firm name, gave to his London agent a power of attorney to buy goods for him in connection with the business, either for cash or on credit, with power to modify or cancel the contracts for purchase, and "where necessary, in connection with any purchases made on my behalf as aforesaid or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London. The attorney, purporting to act on behalf of the plaintiff under this power, obtained a loan of 4000*l.* from M. & Co. ostensibly for the general purposes of the business, and accepted bills of exchange to that amount in his own name per pro the firm. The 4000*l.* was paid into the plaintiff's London banking account, and drawn out by the attorney, who misapplied it, without the knowledge of the plaintiff:—

Held, (1.) upon the construction of the power, that the general words, when construed with the preceding context, did not confer a general power of borrowing; (2.) that the 4000*l.* could not be claimed as money had and received by the plaintiff for the use of M. & Co., inasmuch as he did not know, and had no means of knowing, that the money had been paid into his account until after it was drawn out.

Marsh v. *Keating*, (1834) 1 Bing. N. C. 198; 37 R. R. 75, discussed and applied.

THE plaintiff, Louis Jacobs, was formerly a partner in a firm of tobacco merchants carrying on business in Melbourne under the name of Jacobs, Hart & Co., and in 1898 he became the sole owner of the business. The firm had had an agency in London since 1882. For two months in 1888 the plaintiff was the London agent. In 1893 or 1894 the plaintiff's brother, the defendant Leslie Jacobs, became the London agent, and on January 24, 1899, the plaintiff executed a power of attorney appointing Leslie Jacobs attorney "in and throughout the United States and the continents of America and Europe and all other parts of the world other

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than Australasia and New Zealand for me and in my name, or in my said trading name, to purchase and to make and enter into, sign and execute any contract or agreement with any persons, firm, company or companies for the purchase of any goods or merchandise in connection with the business carried on by me as aforesaid, or for the purchase or acquisition by me of any patent rights, or of the right to the exclusive or partial use of any patent or invention, or for the purchase or acquisition of the right to act as the sole or partial agent of any person, firm, or company, and to make such purchase or acquisition either for cash or on credit, or partly for cash and partly for credit, as my said attorney shall in his discretion think advisable." Then there was a power to modify or vary the terms and conditions of such contracts, or wholly cancel the same, upon such terms as the attorney might deem advisable. Then it continued: "And for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business, to make, draw, sign, accept or indorse any bill or bills of exchange, promissory note or promissory notes, notes of hand or bills of lading which shall be requisite or proper in the premises, and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London, England." A banking account had been kept with the London and Westminster Bank in the name of the firm continuously since 1882, but since 1893 it had been operated upon exclusively by Leslie Jacobs, and it appeared that he had used it partly for the plaintiff's purposes and partly for his own.

The defendants, Messrs. Morris, were a firm of cigar importers carrying on business at 4, Cullum Street, London. They had had dealings with the plaintiff's firm since 1889, and were well acquainted with Leslie Jacobs.

On June 12, 1899, Leslie Jacobs, purporting to act on behalf of his firm, applied to Messrs. Morris for a loan of 4000*l*. He represented that he was authorized to borrow on behalf of the firm by the power of attorney, which he produced, that his firm contemplated manufacturing cigarettes, and that he wanted

cash for machinery for this purpose and for buying leaf tobacco. Upon the faith of these representations, and without looking at the power of attorney, Messrs. Morris agreed to grant the loan, which was to bear interest at 4 per cent., upon the security of bills of exchange accepted by the plaintiff's firm, and upon the condition that the plaintiff's firm should push the sale of a certain brand of cigars, of which Messrs. Morris were the owners, in the Colonies. Accordingly, they handed to Leslie Jacobs two cheques for 2000*l.*, each drawn to the order of Jacobs, Hart & Co., and received from him four bills of exchange to that amount accepted by him as follows: "Per pro Jacobs, Hart & Co. Leslie R. Jacobs." These cheques were paid into the banking account of the plaintiff's firm in London, and were subsequently drawn out by Leslie Jacobs and applied to his own purposes.

On the same June 12 Leslie Jacobs, in further pursuance of the above agreement, purchased from Messrs. Morris cigars to the value of 1070*l.*, in payment of which he gave two bills for 1000*l.* and 70*l.*, accepted in the same way as the former bills.

On July 13, 1899, Messrs. Morris repurchased these cigars from Leslie Jacobs, purporting to act as agent for the plaintiff's firm, for 874*l.* 16*s.* and gave bills for that amount, which were immediately discounted. This money also was applied by Leslie Jacobs to his own purposes.

For the purpose of putting the London agent in funds to pay for goods purchased in London on account of the plaintiff's firm, an arrangement was come to between the firm and their Australian bankers, who had a branch in London, to make advances in the following manner: When Leslie Jacobs bought goods for the firm he took the invoice and the shipping documents to the London branch of the Australian bank, together with a bill of exchange drawn by him in the name of the firm upon the firm itself. Upon these documents the London branch handed him a cheque for the net amount of the invoice under a letter of credit given by the Australian bank to the firm, and sent by the firm to Leslie Jacobs. Leslie Jacobs then paid the money into the firm's account at the London and Westminster Bank, and paid for the goods by a cheque

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drawn in favour of the sellers on the same account. The plaintiff had no knowledge of any borrowing under the power of attorney for the general purposes of the business, and he had no knowledge of the particular transactions in question in this case until after the money had been misappropriated.

In November, 1899, the plaintiff commenced this action against Messrs. Morris and Leslie Jacobs for an injunction to restrain the defendants from negotiating the bills for the 4000*l.* and the 1070*l.* upon the ground that they were accepted without the plaintiff's authority; and the plaintiff also brought charges of fraud against Messrs. Morris which were disproved at the trial. Messrs. Morris counter-claimed against the plaintiff and Leslie Jacobs for payment of the sums due on all the bills with interest thereon at 4 per cent., and alternatively for the 4000*l.* as money had and received by the plaintiff to the use of Messrs. Morris, and the 1070*l.* as the price of goods sold and delivered to the plaintiff, with interest at 4 per cent.

Sir Edward Clarke, Q.C., Upjohn, Q.C., and *Johnston Edwards,* for the plaintiff.

Lawson Walton, Q.C., Butcher, Q.C., and *A. L. Morris,* for Messrs. Morris. 1. Louis Jacobs is liable by reason of a power to borrow given to Leslie Jacobs by the power of attorney. This is to be found in the words "in connection with any such purchases as aforesaid or in connection with my said business." Under the first branch of this clause he is clearly liable for the two bills given in payment for the cigars; the second branch implies a power to borrow, otherwise the words "in connection with my said business" would be superfluous. Further, a power to buy for cash or on credit implied a power to borrow money under a practice which in fact Leslie Jacobs had adopted, for he had drawn bills on Louis Jacobs and discounted them with the bank, at the same time depositing the bills of lading. This was in effect a borrowing. Messrs. Morris dealt in good faith with Leslie Jacobs, and are under no onus to shew that the money was borrowed on behalf of Louis Jacobs: *Bank of Bengal* v. *Macleod.* (1) If a power to

(1) (1849) 5 Moo. Ind. Ap. Ca. 1; 7 Moo. P. C. 35.

borrow is once made out it is not necessary for an innocent lender to shew the necessity for the particular loan: *Montaignac* v. *Shitta* (1); *Bryant, Powis & Bryant, Limited* v. *La Banque du Peuple.* (2)

2. Louis Jacobs is also liable because the 4000*l.* went straight into his banking account and so passed into his possession and under his control. This account is described by the plaintiff in the power of attorney as "my banking account." Although Leslie Jacobs used it for his own purposes, his only power to draw on it was derived from the power of attorney. Money thus paid into a man's banking account is money had and received to the use of the person paying it in: *Marsh* v. *Keating* (3); *Reid* v. *Rigby & Co.* (4)

If the plaintiff is held not to be liable, we ask for judgment against Leslie Jacobs on his implied warranty of authority.

Ellis Griffith, for Leslie Jacobs, submitted to judgment.

Upjohn, Q.C., in reply, admitted liability on the two bills for 1000*l.* and 70*l.* As to the loan of 4000*l.*, Messrs. Morris had notice of the limitation of the power expressly because they saw it, though they did not read it, and impliedly under s. 25 of the Bills of Exchange Act, 1882. The power of attorney contains no power to borrow, express or implied, and a document of this nature must be construed strictly: *Bryant, Powis & Bryant, Limited* v. *La Banque du Peuple.* (5) The general words are controlled by the preceding special terms on the ejusdem generis principle: *Attwood* v. *Munnings* (6); *Harper* v. *Godsell.* (7)

As to the claim for money had and received, there was here no receipt by the plaintiff Louis Jacobs. The account was Leslie Jacobs' account, the only person who could draw on the account being the person whose signature was deposited with the bank; but, assuming that Louis Jacobs had power to draw, Messrs. Morris must shew further that Louis Jacobs knew that the money was there, which he neither did nor could

(1) (1890) 15 App. Cas. 357.
(2) [1893] A. C. 170.
(3) 1 Bing. N. C. 198, 219; 37 R. R. 105.
(4) [1894] 2 Q. B. 40.
(5) [1893] A. C. 170, 177.
(6) (1827) 7 B. & C. 278; 31 R. R. 194.
(7) (1870) L. R. 5 Q. B. 422, 427.

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know. The onus is on Messrs. Morris to shew that Louis Jacobs had the benefit of the money, or had actual or constructive notice that the money had been paid in: see *Marsh* v. *Keating*. (1)

[FARWELL J. referred to *Moses* v. *Macferlan*. (2)]

FARWELL J. This is a case of some little difficulty. So far as regards the issue of fraudulent misrepresentation it is entirely unfounded, and to that extent the action will be dismissed with costs. So far as regards the bills for 1000*l*. and 70*l*. given for the tobacco which was bought, those are not contested by the plaintiff. They were given under the power of attorney, and there must be judgment for that amount. Then there comes the question about the 4000*l*. [His Lordship stated the facts and read the power of attorney, and he continued as follows:—]

Now, in this power of attorney there is not a word from beginning to end about borrowing money. To begin with, there is a strong inherent improbability that a principal intends to give his attorney power to borrow money if he does not expressly state it. It is laid down in one of the cases cited to me—*Harper* v. *Godsell* (3)—that the Court does not construe general terms in such a way as to give a power of borrowing if it is not expressly stated. The general words are confined to matters ejusdem generis with the specific matters already stated. The specific matters stated here are simply purchases. Stress was laid by the defendants' counsel on the words "or in connection with my said business," and it is said with some force that that points to something other than the purchases which had just been mentioned, and which are the only matters specifically mentioned in the body of the power. In my opinion those words are not enough to give a general power of borrowing. I think that they are satisfied by attributing them to such transactions as may be necessary to give effect to the modification or variation or cancellation of the terms of the contract of purchase, and this very case affords an illustration

(1) 1 Bing. N. C. 198, 219; 37 R. R. 105.

(2) (1760) 2 Burr. 1005.

(3) L. R. 5 Q. B. 422.

of that, for the contract for the sale of cigars by Messrs. Morris to the plaintiff was cancelled by a resale to Messrs. Morris, and by their bills of exchange to carry out such resale. That is, to my mind, within the power; although it is not in connection with a purchase, it is in connection with selling. It is a reselling which falls within the power given to the attorney of cancelling the contract of purchase upon terms. It was not contested that that must be within the scope of the power, and there are other matters of that kind which would be sufficient to give effect to those particular words "or in connection with my said business" without giving to them the extraordinarily wide signification which the defendants desire to attribute to them of a general borrowing power.

This view is quite consistent with the authorities cited. In *Bryant, Powis & Bryant, Limited* v. *La Banque du Peuple* (1) Lord Macnaghten says: "Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication." That accords with *Attwood* v. *Munnings* (2), and also with *Harper* v. *Godsell* (3), in which Lord Blackburn pointed out that a power of borrowing was not to be inferred from general words, but that general words were to be restricted to matters ejusdem generis with those already stated. In *Montaignac* v. *Shitta* (4) the point was a different one; in that case there was admittedly authority to borrow, and the question was as to the extent and nature of that particular power of borrowing. It was argued here that the power of attorney admittedly authorized some borrowing. I do not think that that is the true view. The so-called borrowings were described in Louis Jacobs' evidence, where the mode of paying for goods bought was detailed by him. "If Leslie"—that is, the attorney—"bought for us, the practice was to take the shipping

(1) [1893] A. C. 170, 177.
(2) 7 B. & C. 278; 31 R. R. 194.
(3) L. R. 5 Q. B. 422.
(4) 15 App. Cas. 357.

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documents to our Australian bankers and get the cash from them under a letter of credit with which we furnished them, and deposit the bills of lading." That, to my mind, is not a borrowing at all within the ordinary sense of the borrowing power which it is desired to set up under this power of attorney. It was really a special mode of carrying out the power given to the attorney of buying goods and paying for them. It is one thing to give bills in exchange for or in payment of goods; it is quite another thing to do so in order to raise money generally for general purposes. A man may well be willing to entrust his attorney with power to give a bill of exchange for the specific goods that he purchases, but quite unwilling to give him a general power to borrow money on his mere statement that he is going to buy goods, or going to apply it in a particular fashion. I hold, therefore, as a matter of construction, that there is no power to borrow under this power of attorney. That being so, so far as the counter-claim claims judgment on the bills of exchange for the 4000*l.* it fails.

Then it is said that the 4000*l.* was paid into the banking account of Jacobs, Hart & Co., and was therefore received by the plaintiff, the sole owner of that title; and if the money had in fact ever come into his possession with his knowledge, or was there still, that no doubt would be so. It is claimed under the head of money had and received. That is a well-known form of common law action, and it is explained by Lord Mansfield in *Moses* v. *Macferlan*. (1) He points out that one of the distinctions between it and an action for debt is that debt implies contract whereas this does not. Then he proceeds: "This brings the whole to the question saved at nisi prius, viz. whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement. One great benefit, which arises to suitors from the nature of this action,"—that for money had and received—" is, that the plaintiff needs not state the special circumstances from which he concludes 'that, ex æquo & bono, the money received by the defendant, ought to be deemed as belonging to him': he may declare generally

(1) 2 Burr. 1005, 1010.

'that the money was received to his use'; and make out his case, at the trial. This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shews that the plaintiff, ex æquo & bono, is not intitled to the whole of his demand, or to any part of it." I have here a case in which the money is paid into the plaintiff's account. If it stopped there, I should have this difficulty to contend with—that the evidence has left me somewhat uncertain whether the plaintiff could draw on that account or not. Mr. Upjohn has contended that it is not sufficient to shew merely that the money was paid into the account of the plaintiff, but that it is necessary to go further and shew that he could draw on that account. That seems to me to be a question of the onus of proof. I find an account opened in the name of Jacobs, Hart & Co. nearly twenty years ago, drawn upon under the power of attorney to draw cheques upon any London bank that the donor of the power may have, and operations upon it under that power by Leslie Jacobs. If it were necessary for me to determine it, I should hold that the onus is upon Louis Jacobs to shew that he had not the power to draw; primâ facie under those circumstances the man who owns the name in which the account is standing, and has been standing for years, has authority to draw upon it. But that is not the whole case. It is not sufficient to shew that the money went into the plaintiff's account: it is necessary to shew further that the plaintiff knew or had the means of knowing that it had been so paid in. This is the principle involved in the opinion of the judges in *Marsh* v. *Keating*. (1) It was objected there that the proceeds of the sale of certain stock never came into the hands of the defendants so as to be money received by them to the use of the plaintiff. In that case there was a firm of bankers, Marsh & Co., of which Fauntleroy was a member. Fauntleroy had forged the name

(1) 1 Bing. N. C. 198, 219.

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of the plaintiff to a power of attorney, under which he realized a sum of 9000*l.* stock, and paid the proceeds of that sale into the account of Marsh & Co. with another banking firm of Martin & Co. The pass-book of Marsh & Co. passed backwards and forwards between the house of Martin & Co. and the house of Marsh & Co. Fauntleroy took the precaution of getting hold of it and keeping it locked up, so that in fact his co-partners never saw it and never discovered the particular transaction. There was no entry of this dealing in the house book, as it was called, of Marsh & Co. The partners in that case did not in fact know, but they certainly had the means of knowing, if they had not somewhat blindly trusted Fauntleroy. The questions under those circumstances which the judges submitted as material for the consideration of the House of Lords were: "First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy?" (1) Now, if I put similar questions to myself in this case, I find that the first must be answered in the affirmative. The money did actually come into the possession of Louis Jacobs, because it went into his banking account, on which he could have operated. I think that if he had telegraphed or written a letter which reached the bank the day after the 4000*l.* had been paid in and before it was paid out again, he certainly could have effectually stopped it from being paid out. If he had done so he certainly would now have the money in his hands—money belonging to Messrs. Morris—and I cannot see that he would have any defence to the counter-claim. But then there comes the second question which the Court considered it was necessary to answer in the plaintiff's favour before he could succeed: "Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy?" Now, I apprehend that this is really the application of those equitable principles to which Lord Mansfield referred as applic-

(1) 2 Cl. & F. at p. 288; 37 R. R. at p. 105.

able to an action for money had and received. It is not enough to shew merely that the money went into the account of Louis Jacobs unless you also shew that he knew or had the means of knowing it, and this the defendants have failed to shew. Further, in considering whether ex æquo et bono Messrs. Morris ought to succeed, I have to bear in mind that they knew that Leslie Jacobs had no power to borrow under the power of attorney. I do not say they actually knew it, because I accept their evidence that, although the power was actually produced, they did not in fact read it, but, unfortunately for them, relied on the assurance of Leslie Jacobs that he had the power of borrowing under it; but Mr. Lawson Walton admitted that he could not rely upon that. Messrs. Morris were fixed with notice of the contents of the power of attorney, and therefore they knew for this purpose that Leslie Jacobs had no power to borrow money. They therefore lent money, not to him, but to Jacobs, Hart & Co., knowing that Leslie had no power to borrow for Jacobs, Hart & Co. Knowing that, it is not sufficient for them to prove that they paid the money into Jacobs, Hart & Co.'s account, on which they knew, or ought to have known, that Leslie Jacobs had power to draw. They must go further, and shew that Louis Jacobs knew of that payment in—either that he had the benefit of it, or that he knew of it and adopted it. He certainly never got the benefit of it, and he certainly never knew of it; and I find as a fact that he never knew of any borrowing at all by Leslie Jacobs in his name under the power of attorney. That being so, I find an equity against Messrs. Morris in that they chose to pay money into the account of a man who had not authorized anybody to borrow for him. On the other hand, there is no equity affecting Louis Jacobs which prevents him from saying, "I did not want any money borrowed; it was never paid for my benefit, I never got a farthing of it, and, so far as I am concerned, it has nothing to do with me from beginning to end." In my opinion this accords with the principle involved in the second point put in *Marsh* v. *Keating* (1), and on that issue I find in favour of Louis

(1) 1 Bing. N. C. 198; 37 R. R. 75.

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Jacobs. I think that the case before Charles and Collins JJ. of *Reid* v. *Rigby & Co.* (1) entirely bears this out, and so far as I am aware there is no authority to the contrary.

The result is that the claim for money had and received, as well as the claim on the bills for the 4000*l.*, fails.

Solicitors: *Robinson & Stannard; Hollams, Sons, Coward & Hawksley; Edwards & Cohen.*

H. B. H.

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In re RADFORD & BRIGHT, LIMITED.

[0058 of 1900.]

Company—Winding-up—Committee of Inspection—Altering Constitution of—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 23, 24, *Sched. I., r.* 6.

Where a creditor, or a class of creditors (with a substantial interest), of a company which is being wound up by the Court is, through no fault of his or its own, unrepresented on the committee of inspection, the Court may direct the liquidator to summon a meeting of the creditors to consider whether one or more members of the committee should be removed and some other person or persons, representative of the "aggrieved" and unrepresented creditor or creditors, appointed in substitution; or *semble*, may order fresh first or further meetings of the creditors and contributories to be summoned for the following purpose of s. 6 of the Act of 1890, namely, to determine whether an application is to be made to the Court to appoint a committee of inspection, and who are to be its members if appointed.

RADFORD & BRIGHT, LIMITED (below called "the English company"), was, on March 28, 1900, ordered to be wound up by the Court. An action brought by La Société Anonyme l'Industrielle Russo-Belge (below called "the foreign company"), for damages for breach of contract to supply coal, was then pending against the English company. The first meetings of the creditors and contributories of the English company were held on April 23, having been called in pursuance of s. 6 of the Companies (Winding-up) Act, 1890. (2)

(1) [1894] 2 Q. B. 40.

(2) By s. 6 of the Companies (Winding-up) Act, 1890, "(1.) When the Court has made an order for winding up a company the official receiver shall summon separate meetings of the cre-

No notice of the meeting of creditors was sent to the foreign company because by rule (6.) of the 1st schedule to the Act "(6.) A person shall not be entitled to vote as a creditor unless he has duly proved a debt to be due to him from the company, and the proof has been duly lodged before the time appointed for the meeting"; and the foreign company had not proved its debt. On April 23 the creditors' meeting resolved that application should be made to the Court to appoint J. W. Bolton as liquidator, and it was unanimously resolved that application should be made to the Court to appoint six persons named, all of whom were creditors of the English company, as a committee of inspection.

At the meeting of contributories, held on the same day, it was unanimously resolved that application should be made to appoint Bolton liquidator, and "that application be made to the Court to appoint the persons nominated at the meeting of creditors as a committee of inspection."

The Registrar in Companies Winding Up shortly afterwards appointed a person to act as liquidator with a committee of inspection, consisting of the six persons named by the meeting of creditors. On May 1, 1900, leave was obtained by the foreign company to proceed with its action against the English company, against which judgment was obtained on July 6, 1900, for 45,000*l.* damages and costs. The foreign company's proof for this amount was shortly afterwards allowed by the

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ditors and contributories of the company for the purpose of (*a*) determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver; and (*b*) determining whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of such committee if appointed. The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters mentioned in the foregoing provisions the Court shall decide the difference and make such order thereon as the Court may think fit. (2.) The provisions of the first schedule to this Act shall, subject to such modifications as may be made therein by general rules, apply to any meeting summoned in pursuance of this section. (3.) In case a liquidator is not appointed by the Court the official receiver shall be the liquidator of the company."

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liquidator, and the foreign company about the same time asked the liquidator to consent to the appointment of a representative on its behalf on the committee. This request was laid before the committee and refused. The foreign company then asked the liquidator to summon a meeting of the creditors of the English company to decide whether or not the foreign company should be represented upon the committee, and sent him 20*l.* to pay the expenses of summoning the meeting. The liquidator, having been advised that another committee-man could not be appointed, refused to summon a meeting; and the foreign company then issued a summons for an order that the liquidator should summon a general meeting of the creditors of the English company for the purpose of ascertaining their wishes as to whether or not a representative or attorney of the foreign company should be appointed a member of the committee. There was evidence that the amount of debts proved in the winding-up, other than that of the foreign company, was about 43,000*l.*

The summons, having been adjourned into Court, was heard before Wright J. on November 21 and 24, 1900. (1)

(1) Sects. 9, 23, and 24 of the Companies (Winding-up) Act, 1890, are, so far as the same are material, as follows: "9. (1.) A committee of inspection appointed in pursuance of this Act shall consist of persons being creditors or contributories of the company or persons holding general powers of attorney from such persons in such proportions as may be agreed on by the meetings of creditors and contributories or as, in case of difference, may be determined by the Court. (2.) The . . . . liquidator or any member of the committee may . . . . call a meeting of the committee as and when he thinks necessary . . . . (4.) Any member of the committee may resign his office by notice in writing signed by him, and delivered to the liquidator. (5.) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members of the committee who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant. (6.) Any member of the committee representing creditors may be removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting . . . . (7.) On a vacancy occurring in the office of a member of the committee, the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, for the purpose of filling the vacancy, and the meeting may, by resolution, reappoint the same or appoint another creditor

S. O. Buckmaster, for the foreign company. The Court, under its general jurisdiction, has power to control the winding-up proceedings and take care that the interests of creditors and others are properly looked after. It may be that the Court could not remove a member of the committee of inspection and appoint another person in his place, or increase the number of committee-men, but if on an existing committee there is no person representing any particular interest—e.g., that of a large creditor or any class of creditors—a meeting ought to be called under s. 23 of the Act of 1890. If the liquidator will not call a meeting, the person whose interests are not represented is a person "aggrieved" within the meaning of s. 24. At any rate,

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or contributory to fill the vacancy. 23. (1.) Subject to the provisions of the Companies Acts, the liquidator of a company which is being wound up by order of the Court shall, in the administration of the property of the company and in the distribution thereof amongst its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions so given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection. (2.) The liquidator may from time to time summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be. (3.) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding-up. 24. If any person is aggrieved by any act or decision of the liquidator of a company which is being wound up by order of the Court, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just."

Sect. 91 of the Companies Act, 1862, is as follows: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court: in the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company."

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an order to call a meeting of the creditors may at any time be made under s. 91 of the Act of 1862, and the meeting when called can, under s. 9, sub-s. 6, of the Act of 1890, remove one or more of the committee-men from office, and under s. 9, sub-s. 7, fill up the vacancy. *In re Charles Reynolds & Co.* (1) is an authority that the Court can, if necessary, order a fresh first, or, at any rate, a further, meeting for the purposes of s. 6 of the Act of 1890.

The applicant company had no notice of the first meeting of the creditors, and had not then proved its debt. But it is not through any fault of its own that it was not represented at the meeting, and, having regard to the magnitude of its debt, it ought to be represented on the committee of inspection.

Kenyon Parker, for the liquidator. Within the four corners of the Act of 1890 no provision can be found giving the Court power to select any person as a member of the committee. That power is, by s. 6, given to the creditors and contributories exclusively at the first meetings, and the Court can only give effect to the selection or refuse to appoint. When the first meetings have selected the liquidator and committee-men, the functions of the meetings are at an end, and, after the order of the Court under s. 6, sub-s. 1, appointing a committee has been made, the Court cannot interfere. Sect. 9 shews that any change in the constitution of a committee, when once appointed, can only be made by the creditors or contributories. Sub-s. 2 of s. 23 refers only to sub-s. 1, which relates only to questions as to the administration and distribution of the company's assets. Sect. 91 of the Act of 1862 cannot affect committees of inspection, for when that Act was passed there were no committees; they are creatures of the Act of 1890.

The Court has no jurisdiction to make the order applied for. The scheme of the Act of 1890 is that the committee shall be a domestic forum to assist the liquidator, and to give assents which in some cases would otherwise have to be obtained from the Court. A committee-man cannot be removed, even by the committee, except for some specific and definite reason.

Buckmaster, in reply.

(1) W. N. (1895) 31.

WRIGHT J. This is a very peculiar case, and a question of very considerable importance is involved in it.

The first meetings of the creditors and contributories of the company were duly summoned under the Companies (Winding-up) Act, 1890, and the meeting of creditors resolved upon and nominated a committee of inspection. The meeting of contributories recommended that application should be made to the Court to appoint the persons nominated as members of the committee at the meeting of creditors. Creditors whose debts amounted to about 43,000*l.* were represented at the creditors' meeting. But a foreign company or firm, which has now proved against the company in the winding-up for a debt of about 45,000*l.*—that is to say, a larger amount than the aggregate amount of the debts of all the creditors who existed at the time of the meeting—was not in a position to be, and was not in fact, present or represented at that meeting.

This foreign company or firm now comes forward and complains that, although its debt is larger than the total amount of the debts of the other creditors, it is not represented upon the committee of inspection as now constituted, and it asks to have an opportunity to be represented on the committee.

I entirely agree with Mr. Kenyon Parker that, within what is called the four corners of the Act of 1890—the Act which provided for committees of inspection being appointed in the winding up of companies—there cannot be found any provision expressly enabling the Court to interfere directly with the constitution of a committee of inspection when once it is validly appointed. Any power which the Court has must be derived from the general provisions of s. 23 of the Act of 1890, or s. 91 of the Companies Act, 1862. But it seems to me to be undeniable that great hardships might arise if such a very large creditor as the applicant were to be excluded from all representation on the committee of inspection, and more especially as that creditor is a foreigner. I cannot help thinking that it is highly undesirable that foreign creditors or any distinct class of creditors should be left out in the cold merely because, when the first meeting of creditors was held, their debts had not been

WRIGHT J. admitted to proof, and that it is very desirable that everything possible should be done to assist them in this respect.

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It seems to me that, under both the sections I have referred to—s. 23 of the Act of 1890 and s. 91 of the Act of 1862—there is power in the Court to direct the summoning of a general meeting of the creditors to consider any question arising in the winding-up, and, amongst other questions, whether the creditors should or should not exercise the power which they have, under s. 9 of the Act of 1890, of removing one or more members of the committee of inspection, and whether any other person or persons should be appointed in the room of any of those who are removed. If I have that power I think I ought to exercise it, and accordingly I direct a general meeting of the creditors to be summoned to consider those questions. In my judgment the Court probably has jurisdiction, instead of ordering a meeting of creditors to be summoned for the purposes I have indicated, to order fresh first meetings or further meetings to be summoned for the purposes of s. 6 of the Act of 1890; but that would necessitate the summoning of both the creditors and contributories, and I do not think it right at present to encumber the proceedings by directing any meeting to be summoned in such a way as to make it a fresh first meeting. I think, however, that there may be jurisdiction to summon fresh first meetings where it turns out, as it has turned out in the present case, that the committee is not fairly representative of the creditors. I do not see that anything is to be gained at present by calling a meeting of each class of persons interested —that is, the creditors and the contributories. I think it better to act under s. 23 and s. 91, although it seems to me that *In re Charles Reynolds & Co.* (1) is some authority that the Court has power to follow the other course, for in that case Vaughan Williams J. seems to have thought that in a proper case there might be power either to resummon a first meeting or to summon a fresh meeting.

The point is a very important one; but happily I can be set right, if I am wrong, without any one being damaged.

(1) W. N. (1895) 31.

The meeting is not to be held until after ten days. It will be summoned by the liquidator, and the official receiver had better be the chairman of it. If the meeting of creditors which is to be summoned should resolve that it is desirable, instead of removing any member of the committee, to add another person to the existing committee, I think that anything technically wrong in so doing might probably be put right by then resummoning the first meetings of creditors and contributories as a matter of arrangement; and if the creditors then chose to vote for a committee of inspection consisting of seven members, including one representative of the foreign firm, and if the contributories approved that, all would be well. If the two meetings did not come to the same conclusion, then the Court could determine the difference under s. 6 of the Act of 1890.

Solicitors for applicant: *Church, Rendell, Todd & Co.*

Solicitors for liquidator: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

F. E.

BORLAND'S TRUSTEE *v.* STEEL BROTHERS & CO., LIMITED.

[1900 B. 1253.]

Company—Articles of Association—Shares—Restrictions on Transfer—Compulsory Transfer at specified Price in Event of Shareholder's Bankruptcy—Repugnancy—Rule against Perpetuity—Fraud on Bankruptcy Law—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 16.

Provisions in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price are not void as being repugnant to absolute ownership, or as tending to perpetuity.

There is nothing obnoxious to the bankruptcy law in articles which bonâ fide provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and is not shewn to be less than the fair price which might otherwise be obtained.

A share in a company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the company, measured, for the purposes of liability and dividend, by a sum of money,

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but consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862, and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money.

The rule against perpetuity has no application to personal contracts.

TRIAL OF ACTION.

The plaintiff was the trustee in bankruptcy of Mr. J. E. Borland, and he claimed a declaration that the defendant company were not entitled to require the transfer of certain shares held by the bankrupt at any price whatever, and that the transfer articles of the company purporting to give them power to compel such transfer were void. He also claimed an injunction to restrain the company, their officers and agents, from calling for, enforcing, or effecting, a transfer of all or any of the bankrupt's ordinary shares at any price, or, alternatively, at any price less than the fair and actual value of such shares.

The defendant company was a private company formed in 1890 to acquire the business of Steel Brothers & Co., East India merchants, in which the bankrupt had been a partner. The capital of the company at its incorporation was 400,000*l.* in 4000 shares of 100*l.* each. At the date of the incorporation Mr. Borland had 20,000*l.* capital in the business.

The company carried on business as merchants and commercial agents and rice millers in Burma and other countries in the East, and in London. The business was carried on abroad by agents, called managers and assistants, and in London by managing directors; and its success depended to a very large extent upon the exertions of the managers and assistants in the East.

Prior to the year 1897 the managers and assistants were paid for their services by way of salary and commission, and some discontent appeared to have existed among them as to the sufficiency of their remuneration, having regard to the large profits which were enjoyed by the shareholders. This led to the adoption of new articles of association to the exclusion of the then existing articles, the alteration being approved by special resolution duly passed and confirmed at extraordinary general meetings of the company held on May 24 and June 11

respectively. It was admitted that the adoption of the new articles was rendered necessary by the position of the company in 1897, and there was no suggestion of mala fides with regard to any part of the transaction.

The memorandum of association stated (clause 3 (*d*)) that one of the objects for which the company was established was "to transact and carry on all kinds of agency business."

By the new articles the original capital was divided into preference and ordinary shares. Of the 3200 shares already issued 1600 (upon which 100*l*. per share had been paid up) were to be preference shares, and 1600 (upon which 80*l*. per share had been paid up) were to be ordinary shares. The bankrupt received in exchange for his original shares 160 preference and 80 ordinary shares.

Art. 47 provided that as regards all the ordinary shares (specified in a certain table) each of the respective then holders thereof (of which Mr. Borland was one) should be entitled to continue to hold the shares then held by him or any of them until he should die or voluntarily transfer the same or become bankrupt.

Art. 48 provided that no preference or ordinary share which should for the time being remain entitled to the exemption or special right conferred by art. 47 should be liable to be compulsorily taken or purchased under any provision of the articles enabling shares to be compulsorily taken or purchased.

Art. 49 provided that no share should, save as therein provided, be transferred to any person not being a manager or assistant, so long as any manager or assistant should be willing to purchase the same at the fair value. "Managers or assistants" were defined by the articles to be persons receiving remuneration from the company for managing or assisting to manage the business of the company at home or abroad otherwise than as a director only (but including a director also acting as manager or managing director).

By art. 50, in order to ascertain whether any manager or assistant was willing to purchase a share, the proposing transferor was to give a transfer notice to the company, specifying the sum which he fixed as the fair value, and such

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transfer notice was to constitute the company the transferor's agent for the sale of the share to any manager or assistant at the price so fixed.

Art. 52 provided that if the company should, within fourteen clear days after being served with such transfer notice, find a manager or assistant willing to purchase at the price aforesaid any share comprised in the transfer notice, and should give notice thereof to the intending transferor, he should be bound, on payment of the purchase-money, to transfer such share.

Art. 53 provided that the sum fixed by a transfer notice as the fair price for a share should in no case exceed the par value of the share; and that the par value of a share should, for the purpose of the article, be deemed to be the amount paid up, or properly credited as paid up, on such share, plus, in the case of an ordinary share, (*a*) a sum bearing the same ratio to the market value of the investments of the reserve fund account of the company as the capital paid up on the share sold should bear to the total paid-up ordinary capital; (*b*) a sum equal to one quarter of a sum bearing the same ratio to the company's "plant depreciation account" as the capital paid up on the share sold should bear to the total paid-up ordinary capital; and (*c*) interest at 5 per cent. per annum on the total sum arrived at after making such additions as aforesaid, computed from such times and in such manner as were therein more particularly specified. And it was further provided by the same article that a certificate of the auditor of the company should be final and conclusive on all parties as to the par value of any share.

Art. 55 provided that if the company should not within the space of fourteen clear days after being served with the transfer notice find a manager or assistant willing to purchase the share and give notice in manner aforesaid, the intending transferor should, at any time within three calendar months afterwards, be at liberty, subject as therein specified, to sell and transfer the shares, or those not placed, to any person and at any price, provided that such price should not be, without the consent of the directors, lower than the price fixed by the transferor in the transfer notice as the fair value.

Art. 57 provided that on any manager or assistant ceasing to be such, or on his death or bankruptcy, he must, on receiving certain notice, transfer his shares.

Art. 58 provided that in every case where ordinary shares were held by a person not being a manager or assistant, the directors might at any time give to such person notice requiring him forthwith to transfer all or any of such shares, and unless within fourteen days afterwards he should give a transfer notice in respect thereof, he should be deemed to have given such notice in accordance with the articles, and to have specified the par value as defined by art. 53 as the fair value of the shares, and the subsequent proceedings might be taken on that footing.

Art. 58A provided that no notice should be given under the two last preceding articles requiring the transfer of any ordinary share which was for the time being entitled to any of the exemptions or special rights conferred by arts. 47 and 48, and also that no such notice should be given in respect of any ordinary share whatever, except during the one month next after a general meeting of the company at which an annual dividend on the ordinary shares had either been declared, or, profits permitting, would have been declared.

Art. 72 provided that general meetings should be held once in every year, at such time and place as might be prescribed by the company in general meeting; and if no other time or place should be prescribed, in the month of April in every year, at such time and place as might be determined by the directors.

It appeared that a general meeting at which an annual dividend on the ordinary shares had been declared had been held on February 16, 1900, but that the time and place of such general meeting had not previously been prescribed by the company in general meeting in accordance with art. 72.

On February 22, 1900, Borland was adjudicated bankrupt, and the plaintiff was appointed trustee of his estate. At this date he had parted with all his preference shares; but he still held seventy-three ordinary shares. He was then neither a "manager" or "assistant."

On March 7, 1900, notice was served by the company upon

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the plaintiff under art. 58 requiring him forthwith to give to the company a transfer notice within the meaning of art. 50 in respect of the bankrupt's seventy-three ordinary shares; and further notice that, unless, within fourteen days from the receipt thereof, he should give to the company such transfer notice in respect of the said shares, he would, at the expiration of that period, pursuant to the said art. 58, be deemed to have given such transfer notice in accordance with art. 50, and to have specified the par value of the shares as defined by art. 53 as the sum he had fixed as the fair value thereof, and that the subsequent proceedings would be taken on that footing.

It appeared that the par value of the bankrupt's seventy-three shares, calculated according to art. 53, would be about 8650*l.*, whereas the real value of them, as the plaintiff alleged, having regard to the amount of the dividend paid upon them between the years 1892 and 1899, and to the general financial position of the company, would be about 34,000*l.*

The company had paid large dividends in some years, but the dividends had fluctuated from 51*l.* per share in 1893 to 2*l.* 12*s.* 6*d.* per share in 1896; the average dividend for the years 1892–1899 was about 45*l.* per share.

It further appeared that Mr. Borland had in January, 1899, sold seven of his shares under the terms of the articles to a "manager" at 115*l.* 7*s.* 6*d.* per share. The plaintiff, being dissatisfied with the price to be paid for the shares as calculated according to the articles, brought this action on March 21, 1900, claiming the above-mentioned relief.

Jenkins, *Q.C.*, and *W. H. Cozens-Hardy*, for the plaintiff. The company is not entitled to act upon these articles. The transfer articles which impose restrictions upon the free transfer of the shares, and the article (58) which makes sale compulsory under certain circumstances, are repugnant to the legal conception of the nature of personal property, and are, consequently, invalid. They constitute an attempt to create an interest in personal estate which is unknown to the law. An absolute right to personal property, coupled with repugnant restrictions such as these, is not recognised by the law: *Attwater* v.

Attwater (1); *In re Macleay* (2); *In re Rosher* (3); *In re Dugdale* (4); *In re Elliot.* (5) These are chiefly cases dealing with real property, but there is no distinction in principle. *In re Dugdale* (4) involved personalty as well as realty. Here, the shares are to be held on conditions which prevent the holder from realizing them at their true value. The articles impose an absolute fetter on alienation except to a limited class. Such conditions are repugnant to the law: *Billing* v. *Welch.* (6) Under s. 22 of the Companies Act, 1862, shares are personal estate capable of being transferred in manner provided by the regulations of the company. Provisions as to transfer are mere machinery. Table A (8), (9), and (10), shews that there may be restrictions on the registration of transfers. No doubt qualified restrictions such as those may be valid, but the restrictions sought to be imposed by these articles are upon the right of transfer, and cannot be upheld.

[FARWELL J. referred to *New London and Brazilian Bank* v. *Brocklebank.* (7)]

Further we submit, as to art. 58, it is either personal to the registered holder, or it is not. If it be, it is not binding on the trustee in bankruptcy; if it be not, then it must attach to the share, and in that case it is void, as transgressing the rule against perpetuity: *London and South Western Ry. Co.* v. *Gomm.* (8)

[FARWELL J. The question of perpetuity might have been raised, but was not, in *Witham* v. *Vane* (9); and *Walsh* v. *Secretary of State for India* (10) was even a stronger case.]

Here, as in *London and South Western Ry. Co.* v. *Gomm* (8), there is an executory estate or interest in the shares which is liable to arise at any time, apart from the will of the owner. The right of pre-emption constitutes a kind of equity attaching to the shares themselves—running with them. That is more

(1) (1853) 18 Beav. 330.
(2) (1875) L. R. 20 Eq. 186.
(3) (1884) 26 Ch. D. 801.
(4) (1888) 38 Ch. D. 176.
(5) [1896] 2 Ch. 353.
(6) (1871) Ir. R. 6 C. L. 88.
(7) (1882) 21 Ch. D. 302.
(8) (1882) 20 Ch. D. 562.
(9) (1883) Challis on Real Property, 2nd ed., App. V. p. 401.
(10) (1863) 10 H. L. C. 367.

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than a mere personal contract. *Mackenzie* v. *Childers* (1) was another case of mere personal contract.

Again, these articles constitute a fraud upon the bankruptcy laws, and cannot prevail when bankruptcy has supervened. The effect of them is that the trustee in bankruptcy is forced to part with the shares at something less than their true value, and the result is that the asset is not fully available for the creditors: *Wilson* v. *Greenwood* (2); *Whitmore* v. *Mason* (3); *Ex parte Warden* (4); *Ex parte Jay* (5); *Collins* v. *Barker*. (6)

It will be said that the articles were framed in the interests of the company; but that is immaterial. Further, we say that the articles necessitate the company's acting as agent and receiving money for the sale of its own shares, which is ultra vires. The articles are also invalid, on the ground that they are in restraint of trade, and contrary to the policy of the Companies Acts. Finally, we object that the general meeting, within a month of which the notice of March 7, 1900, was given, was neither held in April nor at a date prescribed at a previous general meeting under art. 72. The notice, therefore, was invalid, and cannot be acted upon.

Upjohn, Q.C., and *C. Ashworth James*, for the company. First, it is said that Borland's valuable stake in the company is so fettered as to produce a condition of repugnancy; and, secondly, it is said that the effect of the articles is practically to withdraw a portion of his property from his trustee in the event of his bankruptcy. It is suggested that a large portion of the value of his shares is put in the same position as was the lease in *Whitmore* v. *Mason*. (3)

[FARWELL J. Assuming that the compulsory purchase price is below the real value of the shares, would not that invalidate the whole transaction on the ground of its being a fraud on the bankruptcy law?]

If these restrictions on transfer were removed, the business of the company would fall to pieces to-morrow. In 1897 the

(1) (1889) 43 Ch. D. 265.
(2) (1818) 1 Swans. 471; 18 R. R. 118.
(3) (1861) 2 J. & H. 204.
(4) (1872) 21 W. R. 51.
(5) (1880) 14 Ch. D. 19.
(6) [1893] 1 Ch. 578.

bankrupt's interest in the company was measured by its breaking-up value. He now gets the amount of his capital, together with accumulated profits. There is nothing unfair in that. But for the scheme the company would not now be in existence. The obligation of working for the company is attached to the ordinary shares. There is nothing in the articles obnoxious to the bankruptcy laws. In *Wilson* v. *Greenwood* (1) and *Collins* v. *Barker* (2) the Court found as a fact that the scheme was devised to meet the case of bankruptcy, and was an obvious fraud. That is not so here. This case is covered by the dictum of Page Wood V.-C. in *Whitmore* v. *Mason* (3): "Where there is a bonâ fide intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." On the question of perpetuity, we submit that the rule against perpetuity has no application to a case of personal contract such as is constituted between a company and its shareholders: *Witham* v. *Vane* (4) and *Bradford Banking Co.* v. *Briggs*. (5) There is here no trafficking by the company in its own shares.

Jenkins, Q.C., in reply. Borland's bargain with the company was made in contemplation of bankruptcy, and with the express view that his trustee should be in a different position from himself. It is of the essence of the scheme that the managers and assistants shall acquire the shares at less than the price which might be obtained on a sale to a person outside the company. The trustee is bound to accept an arbitrary price. *Whitmore* v. *Mason* (6) does not apply, because here we are not attacking a valuation. As to the compulsory clauses, if these conditions attach to the shares, then there is a perpetuity; if not, then the plaintiff is not bound.

FARWELL J. (after stating the facts and referring to the articles of association). It is said that the provisions of these articles compel a man at any time during the continuance of

(1) 1 Swans. 471; 18 R. R. 118.
(2) [1893] 1 Ch. 578.
(3) 2 J. & H. 216.
(4) Challis on Real Property, 2nd ed., App. V. p. 401.
(5) (1886) 12 App. Cas. 29.
(6) 2 J. & H. 204.

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this company to sell his shares to particular persons at a particular price to be ascertained in the manner prescribed in the articles. Two arguments have been founded on that. It is said, first of all, that such provisions are repugnant to absolute ownership. It is said, further, that they tend to perpetuity. They are likened to the case of a settlor or testator who settles or gives a sum of money subject to executory limitations which are to arise in the future, interpreting the articles as if they provided that if at any time hereafter, during centuries to come, the company should desire the shares of a particular person, not being a manager or assistant, he must sell them. To my mind that is applying to company law a principle which is wholly inapplicable thereto. It is the first time that any such suggestion has been made, and it rests, I think, on a misconception of what a share in a company really is. A share, according to the plaintiff's argument, is a sum of money which is dealt with in a particular manner by what are called for the purpose of argument executory limitations. To my mind it is nothing of the sort. A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.' That view seems to me to be supported by the authority of *New London and Brazilian Bank* v. *Brocklebank*. (1) That was a case in which trustees bought shares in a company whose articles provided "that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and that when a share was held by more persons than one the company should have a like lien

(1) 21 Ch. D. 302.

and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other person." One of the trustees was a partner in a firm which afterwards went into liquidation, at a time at which it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held that the shares were subject to the lien mentioned for the benefit of the company, notwithstanding the interest of the cestuis que trust which was said to be paramount. If there had been any substance in the suggestion now made, namely, that the right to the lien was the right to an executory lien arising from time to time as the necessity for it arose, it might have been put forward in that case; but the decision was based on a ground inconsistent with any such contention, namely, that the shares were subjected to this particular lien in their inception and as one of their incidents. Jessel M.R. likened it to the case of a lease. Holker L.J. said (1): "It seems to me that the shares having been purchased on those terms and conditions, it is impossible for the cestuis que trust to say that those terms and conditions are not to be observed."

Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that, the case of *Witham* v. *Vane* (2) is a direct authority of the House of Lords; and to my mind an even stronger case is that of *Walsh* v. *Secretary of State for India*. (3) A stronger instance of the unlimited extent of personal liability could hardly be cited; the Old East India Company in 1760, or thereabouts, entered into a covenant with the first Lord Clive, that in the event of the company ceasing to be the possessors of the Bengal territories they would repay to Lord Clive, his executors or administrators, a sum of about eight lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham* v. *Vane* (2), the question of perpetuity was put

(1) 21 Ch. D. 308. (2) Challis on Real Property, 2nd ed., App. V. p. 401.
(3) 10 H. L. C. 367.

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forward tentatively in argument in the House of Lords; but Lord Cairns with his usual discretion did not press it.

I have said that these articles are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under the 16th section of the Companies Act, 1862. Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards; but if I am, the answer so far as they are concerned is that each of them on coming in executes a deed of transfer which, in the terms in which it is executed, makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say there is any repugnancy or perpetuity in the covenant he has entered into, and his trustee in bankruptcy stands in no better position. Counsel for the plaintiff attempted to apply the reasoning in *Gomm's Case* (1) to the present case, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But that is in my opinion unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be.

Then comes the question whether or not these provisions constitute a fraud on the bankruptcy law. I will take the principle as stated by James L.J. in *Ex parte Jay*. (2) The principle is "that a simple stipulation that upon a man's becoming bankrupt that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law." In this particular case I find that all the shares are subjected to art. 58. There is no idea of preferring any one person to another, except so far as is pointed out by art. 47, under which by contract the original shareholders, at the time of the passing of the special resolution for the new articles, retained for themselves the right to refuse the compulsory sale of their shares until they should die, or

(1) 20 Ch. D. 562. (2) 14 Ch. D. 19, 25.

voluntarily transfer the same, or should become bankrupt. It is said that these last words constitute a fraud on the bankruptcy law, and are void. In my opinion that is not so. If I once arrive at the conclusion that these provisions were inserted bonâ fide—and that is not contested—and if I also come to the conclusion that they constitute a fair agreement for the purpose of the business of the company, and are binding equally upon all persons who come in, so that there is no suggestion of fraudulent preference of one over another, there is nothing obnoxious to the bankruptcy law in a clause which provides that if a man becomes bankrupt he shall sell his shares. That is the first step. I am not sure that counsel would have contested that alone. But then the question of price arises. Now I find the price is a fixed sum for all persons alike. No difference in price arises in case of bankruptcy: the effect of bankruptcy is merely to except the bankrupt from the privileges of art. 47. The particular benefit reserved to the holders of the shares therein specified is by contract abrogated in the case of their becoming bankrupt, for the purpose of giving effect to the general scope of the articles, which was that there should be in the company, if it were so desired, none but managers and workers in Burma. There is nothing repugnant to any bankruptcy law in such a provision as that. Is there anything repugnant in the way in which the value of shares is to be ascertained? If I came to the conclusion that there was any provision in these articles compelling persons to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain, such a provision would be repugnant to the bankruptcy law; but it is not so. They all stand on the same footing, and the proper value is to be ascertainable for all alike. These shares can have no value ascertainable by any ordinary rules, because having held, as I do, that the restrictive clauses are good, it is impossible to find a market value. There is no quotation. It is impossible, therefore, for any one to arrive at any actual figure, as to which it may be said it is clear that that is the value, or something within a few pounds of the value. Having regard to the fluctuation in profits that has occurred, it is

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impossible to say the value can be ascertained upon a 10 or 20 per cent. basis—that must be illusory. If it were necessary—I do not think it is—I should be prepared to hold upon the evidence that the price offered by the company in this particular case represents the fair value. I think that by no means an unfair test is afforded by the fact that Mr. Borland himself in January, 1899, sold some of his shares at about the same price. It is not immaterial to consider that two other persons under the compulsory power have been compelled to sell and have not objected. So far as I can see, the terms are reasonably fair, and, assuming that it is a fair mode of arriving at the value—and I think it is—I do not see that it differs from the ordinary provision for valuation such as I find in *Whitmore* v. *Mason* (1) applicable to those cases where assets are capable of valuation. I have to bear in mind that I am dealing with a company whose assets are really in a sense incapable of valuation, but in which the parties have agreed on a basis of valuation which seems to me to be fair. I think I should be straining the principle of the cases on fraud in bankruptcy if I came to the conclusion that an agreement like this, which was come to between the parties after discussion and discontent on the part of some of them, ought to be set aside on the suggestion that it might result in an unfair price. The particular passage to which counsel for the defendant referred in the case of *Whitmore* v. *Mason* (1) was at the end of the judgment. In that case Page Wood V.-C. had before him a partnership deed which contained an article under which, in case of bankruptcy, the partners were to forfeit the whole value of a certain lease. That was held to be bad, and if there had been anything of the sort here I should, of course, have held it bad too. But there was also a provision, which was held to be good, that there was to be a valuation of the share of the bankrupt partner, and the Vice-Chancellor says at the end of his judgment: "Where there is a bonâ fide intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." In my opinion that

(1) 2 J. & H. 204, 216.

exactly expresses the facts of the present case as proved to me, and I think I am following that case when I hold that there is no fraud on the bankruptcy law here.

Then there are one or two other somewhat minor points made by counsel for the plaintiff. First, he says that these provisions are ultra vires. That point turns upon the provisions of the articles which constitute the machinery by which the compulsory sale is to be carried out. The company is constituted an agent for receiving purchase-money: I do not think it comes to more than that; and the company is constituted the agent for sale of the shareholder who is asked to sell. Counsel for the plaintiff says, first of all, that that is not within the memorandum of association. In my opinion it is within the words of sub-s. (*d*) of clause 3 of the memorandum—"To transact and carry on all kinds of agency business." Then it is said that it is contrary to the Companies Act, 1862, and is ultra vires in that sense. I cannot see for myself that there is any trafficking in shares in any way, or that the company is in any way mixed up in anything contrary to the Act. In my opinion that objection fails.

The last point is a technical one and turns on art. 58A. [His Lordship read the article, and continued:—] The notice was given on March 7. The general meeting at which the dividend was declared was held on February 16. It is said that that was not a general meeting properly so called for this purpose, because of art. 72, which provides that "General meetings shall be held once in every year, at such time and place as may be prescribed by the company in general meeting, and, if no time and place is prescribed, in the month of April in every such year at such time and place as may be prescribed by the directors." I am told, however, that a general meeting has never been called in April at all. It was held in February and in March in preceding years. Under those circumstances I consider that the company has waived art. 72, and on the question whether the terms of art. 58A have been complied with, and whether the notice has been given during the first month next after a general meeting of the company at which an annual dividend on the ordinary shares has either been

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declared or, profits permitting, would have been declared, it is clear that the only dividend was in this instance declared at the meeting on February 16, and that the plaintiff has either accepted or applied for it.

That, I think, disposes of all the points that have been raised; and the necessary result is that I dismiss the action with costs.

Solicitors for plaintiff: *Cox & Lafone.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

G. A. S.

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[1899 W. 3264.]

Partnership—Mortgage or Assignment of Share—Dissolution—Sale of Share to Co-partner—Rights of Mortgagee or Assignee—Priority—Accounts—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

The mortgagee or assignee of a share in a partnership is not bound by a sale subsequently made of the share by the mortgagor-partner to his co-partners on a dissolution, or by any agreement then made between the partners themselves purporting to alter the amount or value of the share as fixed by the articles. So long as the partnership continues, the mortgagee or assignee is precluded by sub-s. 1 of s. 31 of the Partnership Act, 1890, from interfering in the management or administration of the partnership, or requiring accounts, or inspecting the books, and he must accept the accounts of profits agreed to by the partners; but immediately upon a dissolution he becomes entitled, under sub-s. 2, to have an account taken, as from the date of the dissolution, for the purpose of ascertaining and receiving the actual share of the mortgagor in the partnership assets, quite irrespective of any agreement between the partners for valuing and dealing with such share as between themselves.

One of two partners who were carrying on a business under a partnership deed mortgaged his share with the knowledge of his co-partner, and afterwards, without the mortgagee's consent, agreed to a dissolution on the terms that he should sell his share to his co-partner for a sum which was less than the amount of the mortgage debt:—

Held, by the Court of Appeal, affirming Farwell J., that the agreement was not binding upon the mortgagee, and that he was entitled, under sub-s. 1 of s. 31 of the above Act, to an account, as from the date of the

dissolution, for ascertaining the actual share of the mortgagor-partner in the partnership assets, and to payment of the amount of the share when so ascertained.

AT the date of the partnership deed hereinafter mentioned the defendant Dennis Driscoll was carrying on business alone as a fishmonger and poulterer in High Holborn. He and the defendant, William Seymour Watts, having arranged that the latter should purchase a half share of the business for 1500*l.*, a deed of partnership dated January 9, 1899, was entered into between them, whereby it was witnessed that in consideration of 1500*l.* paid by Watts to Driscoll they agreed (clause 1) to become partners in the business of fishmongers and poulterers as from January 1, 1899, for the term of fourteen years, unless previously determined by notice in writing by either partner at the expiration of the first seven years, or the partnership should be otherwise determined under the provisions hereinafter contained. And it was provided by clause 7 that the profits of the business should belong to the partners in equal shares; by clause 16, that in case of the death or bankruptcy of either partner the other partner might purchase his share; by clause 17, that if either partner should be guilty of any breach of any of the articles, or should absent himself without consent, or act contrary to good faith, or fail through ill health to take an active part in the partnership business for six months, or become incompetent through lunacy or otherwise, the other partner might determine the partnership on three months' notice; by clause 18, that the price to be paid for the purchase of the share of a deceased, bankrupt or outgoing partner under the foregoing provisions should be the "net value" thereof after providing for the debts and liabilities of the firm on the day of the determination of the partnership, such value in default of agreement to be settled by arbitration and paid by instalments secured by bond, the purchaser indemnifying the vendor and the estate of the deceased or outgoing partner against the debts and liabilities of the firm, and the vendor executing all necessary deeds for vesting in the purchaser the share purchased by him; also, that no partner should be entitled to sell his interest in the partnership without the

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consent of the other partner; by clause 19, that in ascertaining the sum of money to be paid for the purchase of the share of a deceased or outgoing partner, such partner's share of the goodwill of the business should be taken into account, and the sum to be paid for the same should be equivalent to such partner's share of the net profits during the two preceding years as shewn by the half-yearly balance-sheets; and by clause 20, that upon the determination of the partnership, if no other arrangement was made under the foregoing provisions, the goodwill, property, and effects of the firm should be sold as a going concern, and all assets realized and the proceeds applied, first, in paying the debts and liabilities of the firm, secondly, in repaying to each partner the amount of capital brought in by him, with such interest (if any) as might be owing thereon, and that the surplus (if any) should be divided between the partners in equal shares. The partners thereupon proceeded to carry on the business under the provisions of the partnership deed.

To enable the defendant, William Seymour Watts, to enter into the partnership and to provide working capital and other moneys, his father, the plaintiff, James Watts, advanced him a sum of 1921*l.* 18*s.* 8*d.*, and by a deed of March 23, 1899, the son assigned his share and interest in the assets and profits of the partnership to the father by way of mortgage for securing the repayment, on demand, of the said sum with interest at 5 per cent. per annum, the son covenanting to keep the father informed as to the partnership business and give him access to the partnership books to enable him to ascertain how it was going on; and it was agreed that the son should pay the father 2*l.* 10*s.* out of his weekly drawings, together with all his profits on the occasion of the winding up of the half-yearly accounts.

The defendant Driscoll had notice of the existence of this mortgage at least as early as July, 1899. In that month, some disagreement having taken place between the partners, the defendant W. S. Watts expressed a wish to withdraw altogether from the business, and in August following it was arranged between them that the defendant Driscoll should buy him out for 500*l.*, although in the half-yearly partnership account made

up to June 30, 1899, W. S. Watts' share of capital at that date stood at 1860*l.* 13*s.* 2*d.*, and his share of profits at 161*l.* 5*s.* 6*d.*

Accordingly, on September 12, 1899, a dissolution deed was executed by the two partners. After reciting that it had been agreed that the partnership should stand dissolved as from June 30, 1899, and that as from that day the business and the whole of the plant, stock-in-trade, and other assets and effects of the partnership should belong to and the business should be carried on by Driscoll solely for his own benefit, and that W. S. Watts should wholly retire and withdraw from the business, and that all his share and interest in the assets and goodwill of the partnership should be assigned to Driscoll, on his taking upon himself the whole of the debts and liabilities of the partnership which were outstanding on June 30, 1899, and paying to W. S. Watts the sum of 500*l.*, being the agreed value of his share and interest in the partnership and the assets and goodwill thereof as the same stood on that day: and reciting that accounts of the partnership up to June 30, 1899, had been made up and approved by the parties: it was witnessed that, for effectuating the said agreement in that behalf and in consideration of the premises, the partners dissolved the partnership as from June 30, 1899: and it was also witnessed that, in pursuance of the said agreement in that behalf, and in consideration of the premises and of the sum of 500*l.* paid by Driscoll to W. S. Watts as the purchase-money for all his share, estate, and interest in the clear assets, goodwill, and property of the late partnership, after providing for and satisfying all the debts and liabilities as from June 30, 1899, W. S. Watts assigned all his share, estate, and interest whatsoever to Driscoll absolutely. Then W. S. Watts covenanted that he had not at any time theretofore, except as appeared by the partnership books, contracted any debt or obligation which could or might charge or affect Driscoll or the assets or effects of the partnership; and Driscoll covenanted to pay the debts and discharge the liabilities up to June 30, 1899, and thenceforward, and to indemnify W. S. Watts in respect thereof.

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The dissolution was effected without the knowledge of the plaintiff, James Watts, and as the sum paid under it for his son's share was insufficient for the payment of the mortgage debt, the plaintiff brought this action against Driscoll and W. S. Watts, alleging that the sum paid to his son by Driscoll under the dissolution deed was a wholly insufficient consideration for his son's share in the partnership assets and profits, and that the deed was obtained by Driscoll with intent to defraud him, the plaintiff, and with full knowledge of his mortgage security; and he maintained that the deed ought not to stand against him, but that he was entitled to a charge upon his son's share and interest in the partnership business upon the footing that the deed was not operative or binding as against him, the plaintiff. He accordingly claimed (amongst other relief) to be entitled to a charge upon his son's share in the partnership assets as on September 12, 1899, the date of the deed.

The action came on for trial before Farwell J. on March 13, 1900.

In order to affect the defendant Driscoll with notice of the mortgage, the plaintiff produced the copy of a letter of August 11, 1899, which he said he sent to the defendant informing him that he, the plaintiff, held a mortgage on his son's share; but the defendant denied ever having received it, though it appeared never to have been returned to the plaintiff. It was proved, however, that in July, 1899, Driscoll had undoubtedly notice of the mortgage; and there was evidence to shew that the mortgage was originally intended to be contemporaneous with the partnership deed, and that Driscoll was aware of this at the time he executed the articles. In fact, it was not seriously contended that Driscoll had no notice of the mortgage. It also appeared that the plaintiff, on being informed of the arrangement his son proposed to make, refused to concur in it, and that Driscoll was aware of his refusal.

Bramwell Davis, Q.C., and *J. H. Boome*, for the plaintiff. The plaintiff's rights as mortgagee are defined by the Partnership Act, 1890, s. 31. (1) During the continuance of the part-

(1) The Partnership Act, 1890, provides as follows: "Sect. 31 (1.) An assignment by any partner of his share in the partnership, either abso-

nership, he must accept the accounts of profits agreed to by the partners, but on dissolution he is entitled to an account to ascertain his mortgagor's share of the assets, and to receive that share. As against the plaintiff, the partners cannot agree the value of that share; still less can the mortgagor sell it to his partner and give a valid receipt for the purchase-money.

Hughes, Q.C., and *F. P. Onslow*, for the defendant Driscoll. A mortgagee of a share in a partnership takes his mortgage subject to all present and future equities, settled accounts, arrangements, or other transactions arising between the partners during the continuance of the partnership: *Whetham* v. *Davey* (1); *Smith* v. *Parkes* (2); *Kelly* v. *Hutton*. (3) They may write down the capital, or settle between themselves the actual as opposed to the nominal value of their shares as appearing in the books, in which the goodwill and outstanding book debts are treated as equivalent to liquid assets merely for book-keeping purposes, and bear no necessary relation to realizable value. In this case the realizable value of the mortgagor's share was agreed at 500*l.*, and the plaintiff must accept that amount as correct. Sub-s. 2 does not enable the plaintiff to open up previous transactions and compel the partners to resettle accounts or valuations with him. It merely entitles him to an account "as from the date" of the dissolution, i.e., in this case after the actual value of the share has been agreed at 500*l.* He is really asking for an account prior to the

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lute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

"(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

(1) (1885) 30 Ch. D. 574.
(2) (1852) 16 Beav. 115.
(3) (1868) L. R. 3 Ch. 703.

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dissolution, which is exactly what sub-s. 1 precludes him from requiring.

Again, sub-s. 2 does not prevent the mortgagor from giving a valid receipt for the value of his share, or require his partner to get receipts from possibly numerous mortgagees. The subsection so construed would be unworkable. Even if the plaintiff were entitled to the account he asks, he would have to give credit for the 500*l.* paid to the mortgagor.

The mortgagor did not appear at the hearing.

No reply was called for.

FARWELL J. (after stating the facts). But then comes the question of the construction of the Partnership Act, 1890. In my opinion the whole contention on behalf of Driscoll is well founded except in the one point necessary for his success. I think it is correct to say that on the true construction of the Act an assignee or mortgagee takes subject to equities, that is to say, that the partners can, during the continuance of the partnership, settle the accounts as they arise between them in the management or administration of the partnership, and that the mortgagee or assignee has no right whatever to interfere in the management or administration, or to require any accounts, or to inspect the books, but is bound to take the profits as agreed to by the partners. That is the effect of s. 31, sub-s. 1. Then sub-s. 2 provides: "In case of a dissolution . . . . the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution." That obviously points to a dissolution, and not to such a dealing between the partners as I have already mentioned—namely, the ordinary dealing in a going concern with accounts arising from half-year to half-year, settled between the partners in the ordinary administration of the partnership. These the mortgagee or the assignee has to accept. On dissolution a different set of circumstances arises. Leaving untouched all previous accounts relating to management and administration of the business during the partner-

ship, the mortgagee is then entitled to an account as from the date of dissolution to ascertain what his mortgagor's share is. Sale appears to me to be a matter outside this section altogether. The deed I have before me purports to sell the mortgagor's share in the business in consideration of 500*l.* agreed purchase-money. That, in my opinion, is not within the section of the Act at all. What the Act refers to is, first of all, the due administration of the partnership during its continuance, and, secondly, the settling of the shares of the partners after dissolution. A sale is a matter outside that altogether. This deed does not shew that 500*l.* was during the continuance of the partnership ascertained to be the amount of the mortgagor's share. It merely conveys for an agreed lump sum of 500*l.* that which the mortgagor had no power to sell without the consent of his mortgagee. It appears to me that if I were to hold that this was justified, I should in fact be striking out sub-s. 2, because it would appear to follow that the other partners might say to the mortgagee of a share: "You are not entitled to any account as from the date of dissolution, because we have already agreed with the mortgagor that, when dissolution comes, his share is to be so much." That is not in accordance with my view of the Act, and I therefore hold that the plaintiff is entitled to the relief he claims.

There will therefore be a declaration that the partnership was dissolved as from June 30, 1899, and that the plaintiff is entitled to a charge on the mortgagor's share as on that date. There must be an account of what is due on the mortgage, an inquiry of what the mortgagor's share consisted at the date of dissolution, and an account of all dealings and transactions between the partners as from that date.

The 500*l.* paid to the mortgagor cannot be treated as a payment on account to the plaintiff, except as to the 100*l.* which has been paid over to him. Driscoll has in fact bought from a mortgagor who could only give him a title subject to the mortgage.

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The defendant Driscoll appealed.

The appeal was heard on November 29 and 30, 1900.

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Hughes, *Q.C.*, and *F. P. Onslow*, for the defendant Driscoll. The plaintiff alleged that Driscoll had notice of the mortgage, and Farwell J. found that he had. This finding is not now disputed; but the question is whether the plaintiff is bound by the accounts stated in the dissolution deed to have been taken between the partners. It is submitted that, by virtue of s. 31, sub-s. 2, of the Partnership Act, 1890, the plaintiff is bound by those accounts, for there is nothing to shew that the agreement for dissolution was in any way fraudulent. The plaintiff's contention is, that he is entitled to the share of his mortgagor, whatever it might be, as it stood at the date of the dissolution, and to have an account taken to ascertain the amount of that share. It is submitted, however, that, by virtue of s. 31, sub-s. 2, the mortgagee is only entitled to receive that share to which, as between himself and his partner, the mortgagor is entitled, and that, in the present case, is a sum of 500*l.* It would be a great hardship if on the retirement of a partner the continuing partner can have a third person thrust upon him without his consent: that might ruin the business of the continuing partner. The meaning of s. 31 is that the partners shall be able to settle all matters relating to the partnership between themselves, without any outside intervention. An account settled between the partners a month before a dissolution would, if the decision of Farwell J. is right, bind the assignee of one of them, while an account settled immediately before a dissolution would not bind him. The plaintiff may be entitled to an account as from June 30 on the footing that his son's share amounted to 500*l.* on that day. The effect of the decision is to read the concluding words of sub-s. 2 of s. 31 as if they were "an account as from before the date of the dissolution"; and the result is that, if one partner has assigned his share, and the other partner has notice of the assignment, they cannot enter into any agreement as to the terms of a dissolution of the partnership, but the accounts must be taken strictly. Sect. 19 of the Act and s. 42 shew the nature of the account to which an assignee is entitled under s. 31. Where a partner has mortgaged his share and the mortgagee sues to realize his security, if a dissolution has taken place before the action, an

account of the mortgagor's interest should be taken as at the date of the dissolution: *Whetham* v. *Davey* (1); Lindley on Partnership, 6th ed. p. 367. The shares of the partners on dissolution are ascertained as between the partners themselves alone, and the assignee of the mortgagor-partner is bound by whatever the partners themselves may write down as representing their respective shares of capital. The mortgagee of a share in the partnership takes subject to all the equities subsisting between the partners, including the equity that each partner may fix his share at any amount he chooses: Lindley on Partnership, 5th ed. p. 364.

[*Bramwell Davis, Q.C.* The passage in the 5th edition is entirely altered in the 6th, p. 367.]

It is well settled by actual decision that the claims of the other partners on the share of the mortgagor-partner take priority over the mortgagee; that is to say, the mortgagee of any partner takes subject to the equities subsisting between the partners: *Kelly* v. *Hutton* (2); and since he has notice of his mortgagor's title his claim must be postponed to that of the other partner: *Cavander* v. *Bulteel.* (3) The learned judge says this is the case of a "sale" and not of a "dissolution," and that, therefore, the Act does not apply; but there is no substance in that, because, where, as in the present case, there are only two partners, a sale by one partner of his share to the other is in fact nothing but a dissolution.

The word "entitled" in s. 31, sub-s. 2, means "entitled having regard to all agreements that have been made between the partners." The relations between partners are regulated partly by express contract and partly by the law of the land: per Lord Eldon in *Crawshay* v. *Collins.* (4) So here, the partners could, under s. 19 of the Act, by consent vary the terms of their contract, and the Act recognises both in this section and in others, such as ss. 26, 31, 32, and 42, their competence to agree where they are sui juris. That being so, the assignee of one partner is bound by what that partner does. Here there was no privity between Driscoll and the mortgagee

(1) 30 Ch. D. 574.
(2) L. R. 3 Ch. 703.
(3) (1873) L. R. 9 Ch. 79.
(4) (1808) 15 Ves. 218, 226; 10 R. R. 61.

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of his partner; and it is impossible to contend that the mortgagee, who cannot know anything of the partnership business, is a necessary party to any agreement between the partners as to the mode of dealing with their shares and interests. The interest of a mortgagee of a share in a business is merely a mortgage of a chose in action; it is not an interest in any particular portion of the assets, but only in the share of the mortgaging partner in the assets when that share is actually ascertained on the dissolution of the partnership. The mortgage is, in short, in the nature of a fluctuating security. Sect. 31 has reference only to the case of an open dissolution, when there has been no agreement between the partners as to a sale or an account; and this is not that case. The remedy of a mortgagee of a partner's share is provided for by ss. 23 and 33. The existence of engagements with third parties does not prevent the right of dissolution as between the partners themselves: *Featherstonhaugh* v. *Fenwick*. (1)

Bramwell Davis, *Q.C.*, and *J. H. Boome*, for the plaintiff. There can be no doubt upon the evidence that the mortgage was originally intended to be contemporaneous with the articles, and that Driscoll was aware of this. At all events, he had distinct notice of it either in July or August, 1899—that is, before the dissolution. Therefore he cannot rely on any absence of notice. Then, what is the position of the assignee of a share of one partner where the other partner has notice of the assignment? It is quite true that the assignee takes subject to all the equities, that is, the ordinary equities, existing between the partners during the subsistence of the partnership —the equities arising from the ordinary conduct of the partners in dealing with the partnership assets, as in purchases and sales; but he does not take subject to such an act of the partners as the disposal of the partnership itself: *Kelly* v. *Hutton*. (2) When, however, the partners come to dissolution, no further equity arises against the assignee. He can then say, "My share is now fixed, and I am entitled to an account to ascertain the exact amount of it and to have it paid over to

(1) (1810) 17 Ves. 298; 11 R. R. 77. (2) L. R. 3 Ch. 703, 706, 710.

me." In *Kelly* v. *Hutton* (1) it was held that the mortgagee took subject only to the ordinary partnership equities and liabilities. *Cavander* v. *Bulteel* (2) did not carry the point any further; and *Smith* v. *Parkes* (3) is to the same effect. It has been held that the mortgagee of a partner's share is not bound by a settlement of account between the partners subsequent to the date of dissolution, but, in an action to realize his security, is entitled to have accounts taken as at the date of the dissolution: *Whetham* v. *Davey*. (4) Sect. 46 of the Partnership Act, 1890, preserves all the rules of equity and common law applicable to a partnership except where inconsistent with the express provisions of the Act. It is true that under s. 19 the mutual rights of the partners may be varied by consent of all; but the section does not mean that, there being two partners, one of whom has, with notice to the other, mortgaged his share, they can agree between themselves to alter their shares without the consent of the mortgagee. No doubt, during the continuance of the partnership, under sub-s. 1 of s. 31 the assignee of a partner is not entitled to interfere in the management of the partnership or to require accounts of the partnership transactions: all he is entitled to is to receive his assignor's share of the profits, and he must accept such an account of the profits as has been agreed to by the partners. That sub-section operates only while the partnership is a going concern; but in order to see what is to happen as regards the assigning partner's share in the event of a dissolution, we have to turn to sub-s. 2. In that event the assignee is, under that sub-section, entitled to receive his assignor's "share of the partnership assets"—that is, the share of the partnership assets having regard to the partnership articles and any agreement the partners have, during the partnership, entered into between themselves. That share must be determined according to the partnership deed, and for the purpose of ascertaining the amount of the share the assignee is entitled to an account as from the date of the dissolution; and so the learned judge has decided, and his decision is strictly in accordance with sub-s. 2. It is clear that

(1) L. R. 3 Ch. 703.
(2) L. R. 9 Ch. 79.
(3) 16 Beav. 115, 119.
(4) 30 Ch. D. 574, 580.

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in the case of an equitable charge by a partner under s. 23 the Court may order a sale: *Brown, Janson & Co.* v. *Hutchinson & Co.* (1); and we submit that the effect of a legal mortgage is the same, and that the Court may order a sale at the instance of the mortgagee. There is no provision in the articles here that an assignee of either partner is to be bound to accept a smaller share than that to which the assigning partner is entitled under them: such a provision would not be binding under the present law, and it is impossible to say that the assignee is bound by an arrangement between the partners made behind his back. The arrangement in the present case under which the plaintiff, the mortgagee, is to take less than his mortgagor's share as fixed by the articles is not an arrangement arising out of the rights and liabilities of the partnership, and, therefore, is in no way binding on the plaintiff. The true view is that at the date of the dissolution the plaintiff's rights were crystallized and were outside the articles, so that he cannot now be bound by any agreement then come to between the partners themselves. The purchase by Driscoll must be treated in the same way as an ordinary purchase subject to a mortgage; and it is impossible that a person purchasing a share of a partnership with notice of a mortgage on that share can deal with it without notice to the mortgagee.

Hughes, Q.C., in reply.

[VAUGHAN WILLIAMS L.J. referred to *Mangles* v. *Dixon.* (2)]

LORD ALVERSTONE C.J. The only question on this appeal is whether a bargain between two partners, whereby one of them was to go out of the business and sell all his interest to the other partner for 500*l.*, is binding upon the mortgagee of the selling partner's share. The facts are these. [His Lordship stated them, and continued:—]

I have no doubt that Driscoll knew at the time when his partner proposed to sell his share that the father did not concur in the arrangement the son proposed to make. The learned judge did not find as a fact that Driscoll had received the letter of August 11, though it does not appear ever to

(1) [1895] 1 Q. B. 737, 739. (2) (1852) 3 H. L. C. 702.

have been returned. I should myself have come to the conclusion that Driscoll had notice at the date of that letter. But that is really immaterial, because the learned judge came to the conclusion that certainly in July Driscoll knew of the existence of the mortgage.

It was said that under the circumstances the bargain for the sale of the son's share, and the dissolution of the partnership on those terms, are to be treated as binding on the father as mortgagee of his son's share. I agree with Farwell J. that the arrangement ought not to be treated as binding on the father.

In my opinion the rights of the parties are regulated by s. 31 of the Partnership Act, 1890. So far as I can find, up to the time of the passing of that Act there seems to have been some doubt whether the assignee of a share in a partnership had a right to compel the other partners to account; but now, according to the statement in Lindley on Partnership (6th ed. p. 367), s. 31 has settled the rights of the assignee in that respect. I think the dissolution determines the rights of the parties where one partner has assigned his share, and that s. 31 deals with the relations of the several parties under such circumstances. Sub-s. 1 provides that, during the continuance of the partnership, the assignee must accept the account of profits agreed to by the partners. That is in accordance with the view stated in many decisions. Accordingly, so long as the partnership lasts, the assignee or mortgagee of a share cannot, in the absence of fraud, impeach the partnership accounts. Then sub-s. 2 says that in case of a dissolution "the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share, to an account as from the date of the dissolution." We have been pressed by Mr. Hughes to say that the words "the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners" include the share under any arrangement made, in the absence of fraud, between the outgoing partner and the other partners on the basis of which the dissolution took place; and that, whatever the terms of the bargain may be on which the

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outgoing partner dissolved the partnership, even though the bargain has no reference to the share of the partnership assets to which the assignee is entitled, and no provision is made for ascertaining the amount of the share of the assigning partner, or for the taking of accounts, the assignee or mortgagee must be bound by the bargain. That, in my judgment, is going a great deal too far. I think it was intended by the section to give the assignee the right to have the accounts taken whenever the unexpected event happened. It was said that it could be seen on an inspection of the partnership deed that this was a dissolution in a manner not contemplated or provided for by the terms of the deed—that the clauses of the deed shew that a winding-up was provided for on the death or bankruptcy or misconduct of a partner, or upon notice at the expiration of seven years, whereas this was a dissolution by agreement between the partners. It was said that, because the parties "may" agree to put an end to the partnership upon terms not contemplated by the partnership deed and on terms of which the assignee had notice, he is therefore bound by any bargain as to dissolution arrived at, in the absence of fraud, between the mortgagor and the other partner, though it might be made behind his back and against his will. I think that so to hold would render nugatory the provision that, on a dissolution, the assignee is entitled to receive the share to which the assigning partner is entitled as between himself and the other partners, and to have an account taken for the purpose of ascertaining the amount of that share. I think that the old law has not been altered, namely, that the assignee or mortgagee is bound by the accounts bonâ fide taken in the course of the partnership and on the footing of its being a going concern. And it appears to me that if any account was taken in the present case, it was not for the purpose of ascertaining what the rights of the defendant Watts were. But I have come to the conclusion that in this case no account at all was taken. The defendant Watts, having made up his mind to go out of the partnership, makes a bargain with his partner behind the back and against the will of his father, the mortgagee, and says to his partner Driscoll, "Give me 500*l.*, and

you shall have all I possess in the partnership." It was said by Mr. Hughes that this sum was all the share was worth in figures. I do not think that we ought to draw that conclusion from the facts. No reference whatever was made in the arrangement to the actual value of the goodwill, which was clearly a matter deserving consideration; and I think that, in the interest of the mortgagee, an account should be taken, and the value of the goodwill ascertained, and that account he is entitled, under s. 31 of the Partnership Act, 1890, to have taken. The effect of the section is to make clear that which was the law before the Act was passed.

I think Farwell J. was right, and that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. I think that, when you talk of "equities," that is a very different thing from a bargain which may do gross injustice to the mortgagee; and it may have been entered into for that very purpose. If the Act drives us to the conclusion that such a bargain shall be protected, then it must be so; but, in my opinion, nothing of the kind is to be found in this Act. Sub-s. 1 of s. 31 uses the expression "during the continuance of the partnership," the object being to exclude the mortgagee or assignee of a share from interfering with the progress of the business of the partnership. Sub-s. 2 deals with a totally different matter. It provides that if there comes a dissolution on any ground whatever, even though not provided for by the partnership deed, then the assignee of a share in the partnership shall be entitled to the actual share of the assigning partner; not that that partner may, by the terms of the dissolution, alter that share as he pleases or do away with it altogether, but the actual share is to be ascertained by taking an account "as from the date of the dissolution"—in the present case June 30—for the year preceding the dissolution. The assignee is in that respect only placed in the same position as every mortgagee of a chose in action is, because there is no longer any necessity of depriving him of his primâ facie rights when the partnership comes to an end, and the equities of the parties are preserved on a

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dissolution; and if we were to hold that one member of a firm is to be allowed, upon a dissolution, to alter his position altogether as regards his co-partner, and to do so regardless of the interests of the mortgagee which were known to both parties, that would be very far from equitable.

VAUGHAN WILLIAMS L.J. I agree. As I understand the argument in this case, it is not disputed that the order made by Farwell J. would be a right order but for the bargain of sale and purchase entered into between the younger Watts and Driscoll. And that being so, the question one has to consider is whether the agreement made between the younger Watts and Driscoll, being an agreement made with notice of the mortgage or charge, is an agreement which can override the rights of Watts the elder. In my judgment it cannot override those rights. If this had been an equitable assignment by a creditor of a chose in action not connected in any way with partnership relations, no one would deny that if the debtor had notice of the assignment by the creditor of the debt due to him, the creditor and debtor could not enforce as against the assignee an agreement which, subsequently to that assignment, they had made altering the right of the assignee. It is said, however, that this is not so in the case of a partnership, for in the case of a partnership the arrangements and dealings between the partners inter se can affect and alter the rights of the assignee of a share in the partnership. Why so? It is said, by reason of the nature of the relation between partners; and that, because a partner cannot be introduced into a partnership against the will of the other partners, and without the assent of the other partners, therefore, if any one takes a mortgage or assignment of a share in a partnership, that mortgage or assignment must be subject to that partnership relation which is existing and is the basis of that which is assured to him. It was said that, in *Whetham* v. *Davey* (1), it was held by North J. that a mortgagee of a share in a partnership must be taken to be content that during the continuance of the partnership the mortgagor should act as his agent in partnership

(1) 30 Ch. D. 574.

matters, and that he should be bound by what the mortgagor does in the course of the partnership. And it is said that, according to *Kelly* v. *Hutton* (1), the mortgagee or assignee must be taken to have notice of the partnership deed: that it is his duty to inquire what the terms of the deed are, and that he cannot complain of or repudiate anything which is done by the mortgagor, the partner, in pursuance of the terms of the deed. If, therefore, in the present case that which was done when this sale took place had been something done in pursuance of the partnership deed, or something done in the course of that relation, it might be that this agreement for sale, although it injuriously affected the rights of the mortgagee, would have bound the mortgagee; but, in my judgment, what was done here was not something done by the partners in the course of their relation as partners. This agreement was not upon an account taken between the partners in the course of the business. There is no evidence in this case to suggest that the agreement was made in any way to facilitate or carry on the partnership business. It was, as plainly appears, a mere contract of sale and purchase which would of necessity put an end to the partnership; and the question whether such a transaction, entered into subsequently to the mortgage by parties having knowledge of it, can be justified as a transaction entered into by partners in the course of partnership transactions, is a question which, in my opinion, ought to be answered in the negative. Under these circumstances, in my opinion, quite apart from the provisions of s. 31 of the Partnership Act, 1890, this order would have been perfectly right. So far as the section itself is concerned, it, in my judgment, only affirms the view that this order was right. It seems to me that the order made by Farwell J. is exactly in accordance with sub-s. 2 of s. 31.

Solicitors: *W. W. Bond; T. Durant.*

(1) L. R. 3 Ch. 703.

G. I. F. C.

C. A.
1900
Nov. 30;
Dec. 3.

In re WELLBORNE.

[1900 W. 180.]

Costs—Solicitor—Taxation at Instance of Cestui que Trust—Bill paid by Trustees more than Twelve Months previously—Practice—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37–41.

By virtue of the proviso in s. 41 of the Solicitors Act, 1843, taxation, upon the application of a cestui que trust of a bill of costs paid by his trustees, will not be ordered under s. 39 where the application is not made within twelve calendar months after payment; regard being had to what must now be treated as the settled practice of the Court.

Decision of Kekewich J., [1900] 1 Ch. 857, reversed.

THIS was an appeal by Messrs. Wellborne & Son from the decision of Kekewich J. (1)

It was stated that the appeal was supported by the Incorporated Law Society as a test case.

The sections of the Solicitors Act, 1843, discussed in argument are sufficiently set out on pp. 858 and 859 of the report below.

P. O. Lawrence, Q.C., and *Stallard*, for the appellants, repeated the arguments used in support of the motion in the Court below for the discharge of the order for taxation, and, in addition to the cases then cited, referred to *In re Dickson* (2)—where there is a misprint on p. 660 of the report, the proper reference being to "s. 39" of the Solicitors Act, 1843, and not to "s. 38"—(3), *Re Baker* (4), and *Re Press & Inskip.* (5) With regard to *Re Chowne* (6), referred to in the Court below, they pointed out that none of the authorities upon the question, except *In re Drake* (7), were cited before the Court of Appeal in that case. And they contended that the words "any such bill as aforesaid" in s. 41 meant the bill referred to in ss. 37, 38, and 39; that the object of the whole Act was that a solicitor

(1) [1900] 1 Ch. 857.
(2) (1856) 8 D. M. & G. 655.
(3) S.C. 26 L. J. (Ch.) 89.
(4) (1863) 32 Beav. 526, 528.
(5) (1865) 35 Beav. 34.
(6) (1884) 52 L. T. 75.
(7) (1856) 22 Beav. 438.

who had been paid his bill should not be interfered with after the lapse of twelve months; and that, as regarded the right to taxation of a paid bill, a cestui que trust, though not a client, stood on the same footing as a trustee client. The practice initiated by Lord Langdale in *In re Downes* (1) and followed for upwards of fifty years should not now be disturbed.

Warrington, Q.C., and *O. L. Clare*, for the respondent, the beneficiary, used the same arguments as in the Court below, and in addition to the cases they there cited, referred to *In re Brown* (2), *In re Norman* (3), and *Re Massey.* (4) As to *Re Press & Inskip* (5) they observed that no authorities appeared, from the very short report, to have been referred to; and that Lord Romilly M.R., in deciding that case, evidently had not *In re Drake* (6) in his mind. They therefore submitted that the case could not be relied upon as an authority.

[RIGBY L.J. referred to *Ex parte Pemberton* (7), and VAUGHAN WILLIAMS L.J. to *Binns* v. *Hey.* (8)]

LORD ALVERSTONE C.J. If the point raised in this case had come up for decision for the first time, I should have had very great doubt whether we could hold that the twelve months was a bar under s. 39. There is a great deal to be said for the view that, looking at the language of s. 41, it was intended by that section to deal with cases where bills had not been paid; but at the same time, having said that, and wishing that to be understood as being my opinion if this were a matter of strict construction of the sections of the Act, I think that there is a sufficient doubt upon the meaning of those sections to lead us to give great weight to the established practice.

Sect. 37 lays down what I may call the general code with regard to the taxation of bills. Sect. 38 deals with bills which may be taxed under special circumstances on the application of persons not originally chargeable whether they are paid or not. Sect. 39 goes further and says that a bill may be taxed,

(1) (1844) 5 Beav. 425.
(2) (1867) L. R. 4 Eq. 464.
(3) (1886) 16 Q. B. D. 673.
(4) (1865) 34 Beav. 463.
(5) 35 Beav. 34.
(6) 22 Beav. 438.
(7) (1852) 2 D. M. & G. 960.
(8) (1843) 1 D. & L. 661, 666.

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WELLBORNE, *In re.*

Lord Alverstone C.J.

though it has been paid, at the instance of the persons interested in the property out of which it has been paid, the Court having a general discretion as to allowing the reference for taxation. It is to be observed that neither s. 38 nor s. 39 deals with any question of the time which has elapsed after payment: they deal solely with the question of allowing reference after payment, in s. 38, under special circumstances, and in s. 39, on general discretion.

Then we come to s. 41; and I think there is a great deal to be said for the view that this section, on the face of it, looks like a general section applicable to all the preceding sections. If we were driven to put a strict construction on the words "any such bill as aforesaid," in all probability, as I have already indicated, one would consider that they applied to the case of a bill the payment of which had not been previously dealt with; and in the same way, when one finds that the section refers to "special circumstances of the case," one would think that these words applied to the case of some bill as to which no reference on the ground of "special circumstances" had been directed in the earlier sections. Still, that section does not fit exactly either s. 38 or s. 39; and I can quite imagine the view being taken that the words "payment of any such bill as aforesaid" refer generally to the whole of the three sections.

If that is the general scope of s. 41, it is possible to take the view that the proviso at the end which relates to time after payment, a subject-matter that is not touched in any of the previous sections, was inserted in order that there might be a limit with regard to what might be or might not be done after a certain period had elapsed. And in favour of the general application of the section I feel rather pressed by the argument that certainly the taxation does not preclude the cestui que trust from taking exception to the action of the trustee if he has employed the solicitor unduly. It would be no answer to say that the bill had been already taxed as between the trustee and the solicitor; and although it was urged that, where a bill was being taxed as between the solicitor and the trustee—that is, the person liable—the master ought to take into con-

sideration the propriety of the charges, yet still I think this Act was dealing mainly with the question of the solicitor's charges as such.

Under those circumstances (though I admit the result is not very satisfactory to my mind), there being a reasonable doubt as to what was intended to be the scope of s. 41, and it being possible to take the view that at any rate the proviso was intended to apply to ss. 37, 38, and 39, we have what appears to me to be a practically continuous course of decisions from shortly after the passing of the Act down to the present time. On the one side we have the decisions of Lord Langdale, Lord Romilly, Turner L.J., and Kay J. On the other side there is the decision of *In re Drake* (1), which seems to indicate that s. 41 must be limited by reason of the reference in it to "special circumstances" which were also the subject of part of the enactment of s. 38. We have the opinion of Fry L.J. in *Re Chowne* (2) that it was doubtful as to whether s. 41 did apply to cases under s. 39. In this state of the authorities, it seems to me that we ought not to disturb the settled practice, and that if this settled practice on this somewhat doubtful Act of Parliament is to be put right, it must be put right by legislation. For this reason I think the appeal should be allowed.

RIGBY L.J. Sect. 39 does not use the expression "special circumstances"; but I think it is perfectly clear that it is only on special circumstances that a judge could avail himself of the discretion given him by that section. It is not to be supposed that he could in any case, as a matter of course, make such an order as is contemplated by that section. Then s. 41 says that the payment of a bill of costs shall in no case—whether it is a case provided for by s. 39 or not—preclude the Court or judge from referring the bill for taxation, if the special circumstances of the case shall in the opinion of the Court or judge appear to require the same, upon such terms and conditions as may be imposed; "provided the application for such reference be made within twelve calendar months after payment."

(1) 22 Beav. 438. (2) 52 L. T. 75.

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It appears to me, though I do not say there might not originally have been a doubt as to the meaning of the Act, that now, at any rate, we ought to take it as sufficiently settled that, by virtue of s. 41, after payment of a bill, there can be no taxation if twelve months have expired. I think that in *Ex parte Pemberton* (1) Lord Cranworth L.J. clearly indicates that as his opinion. "I entertain great doubt," he said, "whether there is authority, in the absence of a case of fraud, to interfere under the summary jurisdiction which is given or regulated by the Act. The provisions of the 37th section"—the Lord Justice was dealing with s. 37 mainly, no doubt—"are all directed to the taxation of bills remaining unpaid. Then the 41st clause is directed to bills which have been paid, and it contains this proviso"—I think he means there "directed quite generally to bills that have been paid"—"'provided the application for such reference be made within twelve calendar months from payment.' I doubt whether there was any jurisdiction to direct taxation": thus indicating his opinion, although it was not a very conclusive one, that the proviso in s. 41 is applicable—applicable, apparently, not only to cases within s. 37, but to all cases, as, indeed, the very general words of the section would seem to indicate.

VAUGHAN WILLIAMS L.J. I agree. If it had not been for Lord Langdale's decision in *In re Downes* (2), and the subsequent practice that has been referred to, I do not think I should have had any hesitation myself in adopting Mr. Warrington's argument. I feel myself that the construction of this section is reasonably plain; but then, on the other hand, there is Lord Langdale's decision, and there is the fifty years' practice which has followed that decision; and under those circumstances it is more convenient that the practice should be treated as settled. I do not think, however, there is any necessity to treat it as settled to any greater extent than is warranted by direct authority. Now I do not understand that there is a continuous line of direct authority, so far as the application of s. 41 generally to s. 39 is concerned, because.

(1) 2 D. M. & G. 960, 962. (2) 5 Beav. 425.

with regard to the first part of the section, it seems to me that there is direct decision in *In re Drake* (1) that so much of s. 41 does not apply to s. 39. The practice appears to have been rather more limited than that; but on the point that arises before us, it does seem that the practice has been reasonably well settled for the last fifty years.

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LORD ALVERSTONE C.J. The appeal will be allowed, but there will be no costs on either side, either here or below.

Solicitors: *Wellborne & Son; Chester & Co.*

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WRIGHT *v.* SANDERSON.

[1890 W. 694.]

In re SANDERSON'S TRUST.
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[1890 S. 845.]

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Solicitor—Costs—Lien—Infants—Compromise—Judgment—Reserving Liberty to Solicitor to Apply—Form of Order.

A solicitor acting for infants in an action, in consenting to a judgment-compromise whereby a specific fund brought into court in the action is ordered to be paid out to trustees for the benefit of the infants, is entitled to the ordinary solicitor's lien for his costs upon the interests of the infants in the fund as fully and effectually as he would have been entitled thereto had his clients been persons sui juris; and it is not necessary, though it may be desirable, that his right under such lien should be expressly reserved by the judgment.

BY two settlements dated respectively in 1871, trust funds stood settled upon trust for Mrs. Catherine Withington Allen (formerly Mrs. Sanderson) for life with remainder, as to the capital of the funds, for her four children.

In 1890 these actions were brought by the children (the tenant for life not being made a party), all of whom were then

(1) 22 Beav. 438.

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infants, suing by their next friend, against the acting trustee of both settlements, who was the same person in each case, to make good certain alleged breaches of trust whereby the trust funds had been lost. Under an order made in both actions the defendant, the trustee, brought into court a sum of 3899*l.* to the credit of the one action and a sum of 1169*l.* to the credit of the other, the total trust funds thus brought in amounting to 5068*l.*, which was considerably less than the total of the two original trust funds.

Ultimately, a compromise of the plaintiffs' claims in both actions was proposed, which was carried into effect by a judgment—to which the defendant and Mrs. Allen consented by counsel—dated May 6, 1892, and intitled in the matters of the settlements, in the actions, and in another proceeding to which Mrs. Allen had been made a party. The judgment was prefaced thus: "And this Court being of opinion that it is for the benefit of the infant plaintiffs and of the said Catherine Withington Allen that judgment to the following effect should be given, and that the interest of the said C. W. Allen under the above-mentioned indentures of settlement respectively should be bound as hereinafter mentioned." Then it was ordered that new trustees of both settlements should be appointed under the powers therein contained: also that the funds brought into court in respect of the two settlements should be transferred to the new trustees thereof respectively to be held upon the trusts of such settlements: also that the defendant, the trustee, should assign to the new trustees certain policies on Mrs. Allen's life to secure the remaining trust funds due from him under both settlements, to be held by the new trustees in certain proportions upon such trusts as should by the settlements respectively be subsisting at Mrs. Allen's death. And it was further ordered that the plaintiffs' costs of the actions up to and including and consequent upon the judgment should be taxed as between party and party, and also as between solicitor and client; that the defendant should pay to the next friend of the infants the amount of the said costs as taxed between party and party; and that the amount by which the said costs of the plaintiffs, when taxed

between solicitor and client, should exceed the amount of the said costs when taxed between party and party should be raised in equal moieties by the new trustees of the two settlements respectively out of the trust funds subject thereto and paid to the next friend. And after ordering the stay of all proceedings, except so far as it might be necessary to apply to the Court to give effect to the judgment, and ordering the discharge of the defendant from the trusteeship and all liability under the settlements, liberty was reserved to any of the parties to apply to the Court for the purpose of giving effect to the judgment, and generally as they might be advised.

Subsequently to the judgment new trustees of the settlements were duly appointed and made defendants to the action. The plaintiffs' costs as between party and party, and payable by the defendant, were taxed at 643*l.*

The defendant, the late trustee, being a person of no means, having in fact been made a bankrupt in 1895, and there being no chance of obtaining payment by him of the 643*l.*, Mr. Gibson, the plaintiffs' solicitor, took out a summons for a charging order under the Solicitors Act, 1860, for that sum upon the two trust funds, but Kekewich J. dismissed the application with costs.

Mr. Gibson appealed.

During the progress of the actions two of Mrs. Allen's children had attained twenty-one, and had mortgaged their reversionary interests under the settlements. The two other children were still infants. Mr. Gibson acted also for Mrs. Allen, the tenant for life, and for the mortgagees of the two adult children, but the mortgagees had not been made parties to any of the proceedings.

Mr. Gibson's appeal was heard on December 4, 1900.

Renshaw, Q.C., and *Poley*, for Mr. Gibson. The question is whether a solicitor has, by consenting to a judgment-compromise on behalf of his infant clients in the action, lost his right to the ordinary solicitor's lien for his costs upon the property recovered or preserved for the infants through his exertions. We submit that he has not, and that he is as much

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entitled to his lien where a compromise has been sanctioned by the judge on behalf of infants as where it has been entered into by clients who are sui juris. We do not now ask for a charge under s. 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), but rely solely upon the solicitor's right to the ordinary common law lien. The learned judge below thought that as this was a compromise under which the infants were to receive a specified and fixed sum, they were entitled to that full sum without any deduction whatever for costs beyond those stated in the judgment. We submit, however, that unless there is something in the nature of an absolute contract that the solicitor is not to look to the fund for his costs, he is entitled to them as a matter of course. There must be something like a giving up by the solicitor of his common law right in order to deprive him of it; and as he has not in this case contracted or consented to give up his right, he is entitled to have his costs out of the fund in the event of the defaulting trustee not paying them. A solicitor's common law lien is absolute, and is not impeded even where a fund in court has been ordered to be paid out direct to his client: *Lloyd* v. *Mason*. (1) The Court has always recognised the right of a solicitor to a lien for his costs at least on personal estate; and s. 28 of the Solicitors Act, 1860, which gives him a charge upon property of every kind recovered for his client, was passed because it had been decided by the House of Lords in *Shaw* v. *Neale* (2) that a solicitor had no lien on real estate recovered. That statute gives him a charge upon property of his clients when sui juris where it has been recovered or preserved under a compromise: *Twynam* v. *Porter* (3), and other cases collected in Cordery on Solicitors, 2nd ed. p. 312; 3rd ed. pp. 379, 380. That a solicitor is entitled certainly to his common law lien, even in a case of compromise, where his clients are sui juris, does not seem open to doubt; and though under the Solicitors Act the Statute of Limitations—which, it is presumed, runs from the date of the taxing master's certificate—may be a bar to a charge, yet, in the case of the common law lien, whether

(1) (1845) 4 Hare, 132, 134. (2) (1858) 6 H. L. C. 581.
(3) (1870) L. R. 11 Eq. 181.

on documents or on the fruits of judgment, the Statute of Limitations has no effect: *Higgins* v. *Scott.* (1)

[*Warrington, Q.C.* We do not dispute that, as to the common law lien; but this is a case of an infants' fund secured to them under a compromise.]

[RIGBY L.J. It is not quite correct to say that the solicitor's lien is a "common law lien": it is a lien recognised by every branch of the High Court.]

In *Pritchard* v. *Roberts* (2) it was held that, in proceedings under the Declaration of Titles Act, the solicitor had a lien on an infant's fund, and that he so had it under the general jurisdiction of the Court.

Warrington, Q.C., and *Nevill*, for the infant plaintiffs. A compromise sanctioned by the Court on behalf of infants differs from a compromise between parties sui juris in this, that in the former case the judge expresses his opinion, which is inserted in the judgment or order, that "it is for the benefit of the infants."

[LORD ALVERSTONE C.J. Is it to be inferred from that that the solicitor for the infants has no lien on the property he recovers for his clients under the compromise?]

Yes; and for this reason, that the judge puts into the judgment or order a certain fixed sum as the fund of the infants, and directs the payment out of it of certain stated costs, so that it is known exactly what the fund actually coming to the infants is; and nothing further is to be paid out of it. Whether the fund should be further reduced by some additional payment is a matter that must be brought to the consideration of the judge, so that he may decide whether a still further reduction is "for the benefit of the infants." Here it was open to the counsel or solicitor for the infant plaintiffs to have asked, when the proposed judgment for compromise was submitted to the judge, either for a special charge for his costs, or that the judgment should be expressed to be without prejudice to the common law lien, or that, if the late trustee could not pay them, then the present trustees of the funds should pay them. Now, this judgment deals with the funds in a particular way, and by it the

(1) (1831) 2 B. & Ad. 413; 36 R. R. 607. (2) (1873) L. R. 17 Eq. 222.

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judge sanctions an arrangement under which certain costs would come out of the fund and certain others would not. Unless the proposed payment out of the fund of the infants' solicitor's costs were submitted to the judge, it would be impossible for him to say whether the compromise was for the benefit of the infants or not. As these costs have not been brought to the notice of the judge, they must be left to be paid by the defendant who has been ordered to pay them. The assertion of this lien might have upset the whole compromise, the essence of which was that the infants were to have these funds clear of all costs except those stated. The compromise in fact proceeded on the footing that a clear fund was coming in to the infants. Mr. Gibson should have seen that liberty was reserved to him to apply for his costs if it should turn out that the defendant did not pay them. The position is this: the solicitor to the infants stands by and allows the judge to say that a particular sum of some 5000*l.* which has been brought into court shall be accepted as being for the benefit of the infants, while it turns out that if his costs are to be paid out of the fund it will be reduced to some 4400*l.* The lien, if any, must be confined to the shares of the infants themselves.

[VAUGHAN WILLIAMS L.J. The solicitor's lien is not a general lien: it is confined only to the fund belonging to his client: *Verity* v. *Wylde.* (1)]

Poley, in reply. Liberty for the solicitor to apply as to enforcing his lien is never inserted in an order: *Lloyd* v. *Mason.* (2) Such a reservation is quite unnecessary, for his lien is an absolute right given to him by the law of the land. What we ask for is a charge upon the fund limited, as we admit it should be, to the interests of the clients for whom the solicitor is acting. The order should be in the form in *Bonser* v. *Bradshaw.* (3)

Ashton Cross, for the defendants, the new trustees of the settlements.

LORD ALVERSTONE C.J. It is unfortunate that we have not any report of the judgment of the learned judge from which

(1) (1859) 4 Drew. 427. (2) 4 Hare, 134–5. (3) (1863) 4 Giff. 260.

we can ascertain the reasons upon which he founded his judgment; but as far as we can gather from the statements of counsel, he seems to have decided that, as the result of this judgment of May 6, 1892, the solicitor's lien was barred, and that it was the intention of the judgment that all the funds in court should come to the cestuis que trust under two settlements, except the difference between the solicitor and client costs and the party and party costs, which difference the trustees were expressly directed to raise.

Now, looking at the form of this judgment, I confess I cannot take that view. The solicitor is not himself made a party to the judgment, and it seems to me that, upon the face of this judgment, which in no way refers to the solicitor's rights, it is impossible to come to the conclusion, as a matter of law, that his lien is barred. His position seems to have been this. He was acting in the actions for the plaintiffs, who were infants; and I understand he was acting also for the mother of the plaintiffs, though she was not a party to either action. In those actions an order was made directing the defendant, the defaulting trustee of the two settlements, to bring a sum of money into court in respect of each settlement, which was done. Afterwards a compromise was made in both actions, and the judgment to which I have referred to was made, under which the defaulting trustee was to pay the party and party costs, and the new trustees of the settlements were to raise sufficient money for the purpose of paying the difference between the party and party costs and the solicitor and client costs.

It was urged before us that, this being a judgment made on behalf of infants, the learned judge who pronounced it must be assumed to have come to the conclusion that the moneys went to the infants, the solicitor having no right to any lien upon them. I do not take that view. It is not customary to make any reference in a judgment or order to the ordinary lien of the solicitor. If the compromise had been made between parties who were sui juris, it is not suggested that the solicitor's lien would not have attached. In my opinion the result of the infants appearing by their next friend, and of

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the compromise being assented to by the Court, puts the infants in the same position, for the purpose of the solicitor's lien, as if the compromise had been entered into by persons who were sui juris: in other words, the appellant, the solicitor, is entitled to his lien.

Now, the application upon this appeal is not for a charging order under the Solicitors Act, or different questions might have arisen. But the decision of Kekewich J. upon the application in its original form has gone much further than deciding that there can be no charging order; he has gone to the extent of deciding that there is also no solicitor's lien. I am of opinion that there is a lien on the interests of the clients for whom Mr. Gibson appeared in these proceedings. I say nothing as to the interests or priorities of the clients, other than the infants, for whom Mr. Gibson has acted. I limit my judgment to deciding that I see nothing in the judgment of 1892 to deprive Mr. Gibson of his solicitor's lien, which has been called a "common law lien," though I think it is more correctly described, as was put by my brother Rigby in the course of the argument, as a lien recognised by the Court. To this extent I think the appeal must be allowed.

RIGBY L.J. The first and really almost the only question which we have to consider is the true construction of the judgment of May 6, 1892. Now, as regards what was intended at the time, neither the learned judge, nor any of the counsel engaged, nor anyone else can really profess to have any independent recollection; and, therefore, the only thing that we can do is to examine the judgment itself and see what it says. The judgment is one sanctioning a compromise in actions brought by infant plaintiffs whereby certain moneys brought into court by a defaulting trustee under an order were to be placed under the control of new trustees, and in consideration of that further proceedings against the defaulting trustee are stayed. Of course, he is ordered to pay such costs as he can be made to pay of the litigation which rendered that order necessary—that is, party and party costs; but there are other costs, namely, the extra costs as between solicitor and client, which he cannot

be ordered to pay, and there is nobody to pay them except the plaintiffs themselves, and the plaintiffs themselves must pay them out of their own interest, and that is what is provided for by the judgment.

Now, what is there said in this judgment about the solicitor's rights? Not a word of any kind. I should infer from that, that his rights, whatever they were, were not intended to be interfered with. I suppose it might have been made a term of the arrangement, that the solicitor should give up his claims as against the fund, however valuable they might be; but I should think a judgment of the Court requiring him to do such a very unusual thing would have taken care to have made it perfectly plain, and I do not know how it could have been done better than by getting a release from the solicitor and having it entered in the judgment; or it might have been done by getting the solicitor to appear by counsel and consenting to the judgment, and then making an order against him personally that he should not have recourse to the infants' fund for the purpose of enforcing any rights he might have. Nothing of the sort is done, and I must conclude that nothing of the sort was intended to be done. At all events, the solicitor is not bound in any way in this judgment. I agree with what has been suggested as being the proper order to be made in this case.

VAUGHAN WILLIAMS L.J. I agree; and I only wish to add that there is no evidence of the solicitor having entered into any bargain to give up his lien, and he has not, by the terms of the judgment, lost his lien. That lien is, of course, limited to the interests of the clients for whom he acted. I do not understand that we are at present called upon to express any opinion as to what may be the effect of our present judgment in favour of the solicitor—whether or not there are any prior incumbrances overriding the interests of his clients. (Note, infra.)

Solicitors: *Gibson, Usher & Co.; Wetherfield, Son & Baines; C. E. T. Lamb.*

NOTE.—In *Rake* v. *Hooper*, not reported, [1900 R. 995], which was an action by a father against his children, some of whom were infants, to rectify a

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post-nuptial settlement, Kekewich J., at the trial on December 6, 1900, dismissed the action with costs; and on his Lordship's attention being called by Mr. Renshaw, Q.C., the leading counsel for the defendants, to the decision of the Court of Appeal in the principal case, he gave judgment to the following effect: Dismiss the action. The plaintiff to pay the costs of the defendants as between party and party; and the defendants' costs as between solicitor and client to be raised and paid out of the settlement fund by the trustees. Liberty to apply, in case of non-recovery of the party and party costs, for them to be paid out of the trust fund.—G. I. F. C.

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In re BORAX COMPANY. FOSTER *v.* BORAX COMPANY.

[1899 B. 608.]

Company—Memorandum of Association — Objects—Amalgamation— Sale of Business to another Company—Purchase-money—Shares in purchasing Company—Agreement not to carry on Business—Ceasing to carry on Business—Ultra vires—Debentures—Floating Charge—Substituted Security —Dissenting Debenture-holders, Rights of.

The memorandum of association of a limited company included, among its objects, the carrying on of a business of a specified nature, and also the carrying into effect of arrangements for amalgamation or union of, or sharing in interests whether in whole or in part with, any other company carrying on any business similar or analogous to any business authorized by the memorandum; and also the sale of all or any part of the company's business or property and the holding of any debentures, shares, stocks, or securities of any other company.

The company sold the whole of its property and assets, including the goodwill, with the exception of certain securities, which it retained as its own property, to a new company formed for the purpose of acquiring and working the old company's business and similar undertakings, the sale being in consideration of debenture stock and shares in the new company, and the old company agreeing not to carry on any similar business otherwise than in conjunction with and for the benefit of the new company.

The old company had, before the sale, issued debentures charging, "by way of floating security, all its property, undertaking, and assets for the time being, whether present or future," and becoming immediately payable upon an order or effective resolution to wind up.

In a debenture-holders' action against the old company claiming that by the sale it had ceased to carry on its objects as defined by the memorandum, and that therefore the debenture charge immediately attached:—

Held, that the plaintiffs' claim failed, because (1.) the sale was not

ultra vires of the memorandum of association; (2.) the old company's undertaking had not ceased to be a going concern, so that the debentures were still nothing more than a "floating security"; and (3.) the debentures, being a floating security, did not give the holders any right to interfere with what the company had done in the ordinary course of its business as defined in the memorandum of association.

Decision of Farwell J. reversed.

Decision of North J., [1899] 2 Ch. 130, disapproved.

Per Vaughan Williams L.J.: Whether on the sale the old company could preclude itself from exercising its powers in respect of what was in fact the principal object included in the memorandum, and whether so to do would not endanger the security of the debenture-holders by limiting and altering it, *quære.*

THE Borax Company, Limited, was incorporated in 1887. The objects of the company, as stated in the memorandum of association, were so far as material as follows:—(*a*) "To carry on in the United Kingdom, France, Germany, Belgium, Turkey, and elsewhere, as may from time to time be determined, the business of miners, refiners, distillers, manufacturers of and dealers in (either wholesale or retail) boracite, borax, boracic acid, and any other similar ores, and any other business incidental or subsidiary thereto"; (*b*) to purchase, lease, rent, or acquire mines; (*c*) to purchase, acquire, work, and carry on certain named factories; (*d*) "to form or assist in the formation of any subsidiary, allied, or affiliated companies, and to make and to carry into effect arrangements, whether by purchase or otherwise, for the acquisition of the goodwill of or any interest in any business of the kind authorized by this memorandum, or for amalgamation or union of or sharing in interests, whether in whole or in part, with any other company, person, or persons or public or private undertaking carrying on any business similar or analogous to any business which the company is authorized to carry on; to sell all or any part of the company's business or property, and to subscribe for, take, hold, distribute, allot, sell, or deal with, or guarantee or indorse any debentures, shares, stocks, or securities of any other company, société anonyme, or other association or undertaking."

The company soon after its incorporation issued a series of debentures for 100*l.* each bearing interest at the rate of 6 per

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cent. The prospectus issued to the public inviting subscriptions to the debentures stated the objects of the company as specified in the memorandum of association. The debentures issued were expressed to be a charge by way of floating security on the undertaking of the company, whose property included various mining concessions. The plaintiff, Arthur Foster, became the holder of 114 of these debentures. In May, 1898, the Borax Company went into voluntary liquidation for the purpose of carrying into effect a scheme of arrangement with the debenture-holders. In July, 1898, the Court sanctioned the scheme, declaring it to be binding on the debenture-holders, and stayed all further proceedings in the winding-up except for the purpose of carrying the scheme into effect. The scheme of arrangement provided that the company should execute new debentures, divided into two classes, "A" and "B," and should distribute them among the holders of the old debentures, which should thereupon become extinguished, in the proportion of one "A" and one "B" debenture for every old debenture. By the form of each "A" debenture the company agreed to pay on a future date (left blank) or on such earlier date as was therein mentioned to the bearer or registered holder the sum of 50*l.*, with interest in the meantime at 4 per cent., and charged with the payment of the principal sum and interest by way of floating security "all the property, undertaking, and assets for the time being, whether present or future," of the company. The debenture was made subject to the condition that the principal moneys secured by the debenture and all arrears of interest should immediately become payable if an order was made or an effective resolution passed for the winding up of the company. The "B" debentures were, so far as material for the present purpose, in the same form, and contained a similar condition. In pursuance of this scheme the company issued to the plaintiff 114 "A" and 114 "B" debentures, all for 50*l.* each. The total issue of each series was 2952 of 50*l.* each. Subsequently, by an agreement of November 29, 1898, between the Borax Company, as vendors, and the defendant Lafayette Hoyt De Friese, as purchaser, after a recital that a company to be called Borax

Consolidated, Limited, was about to be formed with the object of acquiring and working the property and assets of the Borax Company, and of other companies carrying on a similar business, it was agreed—that the Borax Company should sell and the defendant De Friese purchase, free from incumbrances, the property and assets (the word "undertaking" was not included) of the Borax Company as set out in the 1st schedule; that the consideration for the sale should be 320,000*l.*, to be paid, as to 100,000*l.*, at the option of the defendant De Friese, either in cash or by the issue to the Borax Company of 4½ per cent. debenture stock of Borax Consolidated; as to 150,000*l.*, at the option of the defendant De Friese, either in cash or by the allotment of 10*l.* fully paid cumulative preference shares of Borax Consolidated, and as to 70,000*l.*, by the allotment of 10*l.* fully paid ordinary shares of Borax Consolidated; that all principal moneys and interest in respect of debentures or other charges on the premises agreed to be sold should be paid and discharged by the Borax Company; and (clause 10) that after the date of the agreement the Borax Company would not "carry on business as miners, refiners, distillers, or manufacturers of or dealers in boracite, borax, boracic acid, or similar ores, substances, or products, or as owners of borate or other similar properties, otherwise than in conjunction with and for the benefit of and on behalf of the new company." In the 2nd schedule it was provided that certain securities to the value of between 23,000*l.* and 24,000*l.* were to be retained by the Borax Company as its own property, but otherwise the whole of its property and assets, including goodwill, were comprised in the sale to the defendant De Friese.

By an agreement of January 10, 1899, between the defendant De Friese and a trustee on behalf of the company then about to be formed and to be called Borax Consolidated, Limited, the defendant De Friese agreed to sell, inter alia, to the Consolidated Company all the property and assets included in the agreement of November 29, 1898, subject to the provisions contained in that agreement. On January 11, 1899, Borax Consolidated, Limited, was registered with a share capital of 1,400,000*l.* The assent of some of the debenture-holders in

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the Borax Company had been obtained to the proposed sale, but others objected on the ground that the sale would diminish or prejudice their securities. Accordingly, on February 9, 1899, the writ in the present action was issued against the Borax Company, Borax Consolidated, and De Friese, by which the plaintiff, one of the dissenting debenture-holders, purporting to sue on behalf of himself and all other debenture-holders in the Borax Company, claimed—(1.) a declaration that the "A" and "B" debentures constituted a charge on all the property, undertaking, and assets of the defendants the Borax Company; (2.) that those defendants might be perpetually restrained from carrying out the proposed sales to the defendants De Friese and Borax Consolidated without first making due provision for the satisfaction of the "A" and "B" debentures; and (3.) that, in the alternative, the debentures might be enforced by foreclosure and sale. On the part of the Borax Company it was contended that the proposed sale was authorized by the terms of their memorandum of association, and therefore that the effect of the sale would be simply to transfer the floating charge created by the debentures to the cash, debenture stock or shares to be paid or transferred by Borax Consolidated to the Borax Company as the consideration for the sale, the securities retained by the Borax Company also remaining subject to the charge; and that by the sale the original property and assets of the Borax Company sold to Borax Consolidated would ipso facto become freed from the floating charge created by the debentures.

On March 21, 1899, North J. (1) granted an interim injunction to restrain the carrying out of the proposed sale without first making due provision for the payment of the debenture-holders whose assent had not been obtained, upon the ground that the Borax Company had ceased to carry on the business which it was carrying on when the debentures were issued, and that it was not entitled to substitute a new security against the wishes of the debenture-holders. The Borax Company appealed, and before the appeal came on for hearing they had obtained the assent of nearly all the debenture-holders to the

(1) [1899] 2 Ch. 130.

proposed scheme, so that there remained only a balance of 16,800*l.* worth of debentures held by persons, including the plaintiff, who had not assented. The appellants, the Borax Company, offered to pay 16,800*l.* into court to abide the issue of the trial, and on those terms the Court of Appeal, upon the appeal coming on for hearing on May 11, 1899, made an order discharging the interim injunction, but without expressing any opinion on the merits of the case. In consequence of this order the agreements of November 29, 1898, and January 10, 1899, were carried into effect.

The whole of the property and assets of the Borax Company, which were set out in the 1st schedule to the agreement of November 29, 1898, with the exception of the securities to the value of between 23,000*l.* and 24,000*l.* specified in the 2nd schedule, were, in pursuance of that agreement and the subsequent agreement of January 10, 1899, eventually transferred to or vested in Borax Consolidated, and the defendants, the Borax Company, had transferred to or vested in them, and they were now the holders of, 100,000*l.* 4½ per cent. debenture stock of Borax Consolidated, fully-paid cumulative preference shares of 10*l.* each in the same company to the amount of 150,000*l.*, and fully paid ordinary shares of 10*l.* each in the same company to the amount of 70,000*l.*, the whole being in satisfaction of the agreed purchase-money of 320,000*l.* The defendants, the Borax Company, also retained, as their own property, the above-mentioned securities to the value of between 23,000*l.* and 24,000*l.*

At the subsequent trial of the action, which took place before Farwell J., the plaintiff claimed to be entitled to have his debentures paid off or to foreclosure, and contended that the interim injunction had been discharged on the terms that he should get that to which he was entitled. Farwell J., in giving judgment, expressed himself as clearly of opinion that the Court of Appeal intended that the sale should proceed, and that the money paid into court was meant to be a security for the dissenting debenture-holders in substitution for the assets sold by the Borax Company. His Lordship accordingly gave judgment declaring that the plaintiff and all others the holders of

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the "A" and "B" debentures had a continuing floating charge on all the property, undertaking, and assets of the defendants, the Borax Company, but not on such of the said assets as were sold to the defendants De Friese and Borax Consolidated. The judgment then proceeded: "And doth order and adjudge that the plaintiff, Arthur Foster, and all other the holders of the said debentures who have not assented to the sale, have a floating charge on the 16,800*l.* money on deposit in court to the credit of this action."

The defendants, the Borax Company, appealed.

Swinfen Eady, Q.C., and *P. B. Abraham*, for the Borax Company. The question now is whether the plaintiff and the other dissenting debenture-holders are in a position to claim immediate payment of their debentures out of the 16,800*l.* in court, that is, to be paid in priority to the assenting debenture-holders. We submit they are not. The plaintiff is seeking to restrain the company from selling a large part of its business to another company, on the ground that he would be prejudiced by the sale, because (1.) the company would thereupon cease to carry on the business which it was carrying on when his debentures were issued, and (2.) that the sale would be prejudicial to him as a debenture-holder in exchanging his security for another which he considers insufficient. Upon the question whether the company can sell any part of its assets without the consent of the debenture-holders or mortgagees, we submit that it can, and that the debenture-holders are not entitled to complain, for the sale is for the purpose of effecting an "amalgamation or union" and "sharing in interest" with another company, which are among the objects of the company, as expressed in its memorandum of association of which the debenture-holders had express notice by the prospectus under which they subscribed for their debentures. The transaction is therefore intra vires of the company. The company has not, under it, ceased to be a going concern, and the right of a debenture-holder to enforce his security against a company only attaches if the company parts with substantially the whole of its undertaking and assets otherwise

than in due course of business, and ceases to be a going concern: *Wall* v. *London and Northern Assets Corporation* (1); *Hubbuck* v. *Helms*. (2) Here the sale is made in due course of business under the authority of the memorandum. When the case came before this Court upon the interlocutory appeal, there was no bargain between the parties; the injunction was merely dissolved upon the terms of 16,800*l*. being paid into court to await the determination of the plaintiff's rights. The debentures are a floating charge, and while the company is a going concern the directors have power to deal with the assets in any manner authorized by the memorandum. It is said on behalf of the plaintiff that the company propose to give him a security of a different nature from that for which he bargained; that he has a charge upon some concessions and a business, whereas it is now proposed to give him instead a charge upon shares and stock of another company. But the plaintiff had no specific charge upon the concessions; his charge was a floating security upon "all the property, undertaking, and assets for the time being" of the company. The meaning of a "floating security" is shewn by the *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (3) There Lord Macnaghten said (4): "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time."

[LORD ALVERSTONE C.J. Is not the real question whether the company have power to alter the undertaking which is charged?]

The question is, Have the directors power under the memorandum of association to do that which they have done? If they have that power, there is no limitation as regards debenture-holders. The operation of a memorandum of association is illustrated by *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (5); *New Zealand Gold Extraction Co.* v. *Peacock*. (6) No case can be found before the present

(1) [1898] 2 Ch. 469.
(2) (1887) 56 L. J. (Ch.) 536.
(3) [1897] A. C. 81.
(4) [1897] A. C. 86.
(5) [1892] 3 Ch. 454.
(6) [1894] 1 Q. B. 622.

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in which a debenture-holder has been allowed to interfere with the management of the company by the directors. It has long been settled that, so long as the company is carrying on its business, a debenture-holder, though having a charge upon its "undertaking," is not entitled to interfere: *In re Panama, New Zealand and Australian Royal Mail Co.* (1) Nor does a change in the mode in which the business is carried on, or the fact that it is carried on by a different hand, entitle him to interfere: *Willmott* v. *London Celluloid Co.* (2) If the assets were being made away with, the debenture-holders would, no doubt, be entitled to interfere to prevent the loss of their security; but here their charge will not be prejudicially affected, though the property charged will be different. It is submitted that the decision of North J. in the present case (3) was erroneous. The company has not ceased to carry on business, though the mode of carrying it on has been altered. In *In re H. H. Vivian & Co., Limited* (4), the Court refused to restrain the company from selling one of three businesses upon which debenture-holders had a floating charge. The transaction is a beneficial one to the plaintiff and all others interested in the Borax Company, and should therefore not be set aside.

[They referred also to *Wallace* v. *Universal Automatic Machines Co.* (5) as to the time when a debenture becomes enforceable.]

Hughes, Q.C., and *A. C. Clauson*, for the plaintiff. It is immaterial whether the transaction which is impeached is beneficial or not; the question is whether the security for which the plaintiff bargained has been taken away from him. The company charged their undertaking. What was their undertaking at that time? It was the manufacture of and the dealing in borax and other similar substances. A great many of the so-called "objects" of the company which are mentioned in the memorandum of association are really powers rather than objects. Everything else is merely incidental to the main object.

(1) (1870) L. R. 5 Ch. 318, 322.
(2) (1886) 34 Ch. D. 147.
(3) [1899] 2 Ch. 130.
(4) [1900] 2 Ch. 654.
(5) [1894] 2 Ch. 547.

[RIGBY L.J. referred to *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1)]

Under the agreement the company expressly precluded itself from continuing to carry on any part of its main business; that is to say, the very business which it had previously agreed should be the plaintiff's security is to be taken away from him.

Then, what was the plaintiff's charge? It was a "floating charge"—that is to say, it gave an immediate equitable charge upon the assets of the company, subject to a right to the company to deal with or dispose of its assets in the ordinary way of business, but not otherwise: Buckley on Companies, 7th ed. p. 186, and the cases there cited: *In re H. H. Vivian & Co., Limited* (2); *Wallace* v. *Evershed.* (3) Selling an existing business and then buying a business of another company may be a dealing in the ordinary course of business; but that is quite different from, as in the present case, selling the whole of the company's assets and converting it into a mere investment company for holding investments. In *In re H. H. Vivian & Co., Limited* (4), the reason the Court did not interfere was that the sale was only one of three businesses; if the whole of the three had been sold, it is clear from the judgment that the decision would have been the other way. The basis of the judgment was that the company was selling only a part, not the whole, of its undertaking.

[RIGBY L.J. Have you considered the cases in which the question has been whether the substratum of the company has gone?]

The principle of the decisions on that point is this—that if a company has parted with or ceased to carry on its principal objects, it cannot carry on objects that are merely ancillary: *In re German Date Coffee Co.* (5); *In re Haven Gold Mining Co.* (6) There is no bargain with the debenture-holders here that the company shall be at liberty to take away the property on which they hold a charge and substitute a totally different property for it. Neither is there any clause in the trust deed

(1) (1875) L. R. 7 H. L. 653.
(2) [1900] 2 Ch. 654, 657–8.
(3) [1899] 1 Ch. 891, 894.
(4) [1900] 2 Ch. 654, 658.
(5) (1882) 20 Ch. D. 169.
(6) (1882) 20 Ch. D. 151.

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providing that the minority of the debenture-holders shall be controlled by the majority.

Swinfen Eady, Q.C., in reply. In considering what acts of a company are authorized by its constitution, the doctrine of ultra vires must be applied reasonably: *Attorney-General* v. *Great Eastern Ry. Co.* (1), qualifying *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) There is no covenant by the company in the trust deed here, as there was in *In re H. H. Vivian & Co., Limited.* (3) No doubt, if a company has ceased to carry on its business, it may be wound up under the "just and equitable" clause: s. 79, sub-s. 5, of the Companies Act, 1862; and then the rights of the debenture-holders attach; but my contention is that this company has not ceased to carry on business. *In re German Date Coffee Co.* (4) and *In re Haven Gold Mining Co.* (5) are cases very far removed from the present. No order could be made for winding up this company. What the company propose to do is to deal with its property in the ordinary course of its business as defined in the memorandum of association. The revenue of the company will be derived, as before, from the manufacture and sale of borax and other kindred substances, and no damage whatever will accrue to the debenture-holders.

Cur. adv. vult.

Dec. 17. LORD ALVERSTONE C.J. This is an appeal from a judgment of Farwell J., who has decided that certain debenture-holders of the reconstructed Borax Company have a charge on a sum of 16,800*l.* in court to the credit of the action. The effect of the judgment is to give the plaintiff and all other dissenting debenture-holders the right to be paid the amount of their debentures out of that sum of 16,800*l.*

The facts are as follows: [His Lordship stated them, and continued:—] We have now to consider whether the plaintiff and the other dissenting debenture-holders are entitled to enforce payment of the amount of their debentures in priority

(1) (1879) 11 Ch. D. 449, 480; (1880) 5 App. Cas. 473, 478.
(2) L. R. 7 H. L. 653.
(3) [1900] 2 Ch. 654.
(4) 20 Ch. D. 169.
(5) 20 Ch. D. 151.

to the assenting debenture-holders. The objects of the company must, of course, be gathered from the memorandum of association. [His Lordship stated them, and continued:—]

Farwell J. has not decided that the company had so ceased to carry on business that it could be wound up, nor was this contended before us in the argument on behalf of the respondents. I come to the conclusion upon the facts that the company will, notwithstanding the arrangement made with De Friese, still be carrying on some part of the undertaking as contemplated by the memorandum of association, and could not be wound up.

I also come to the conclusion, which is, perhaps, another way of stating the same view, that the company, in the agreements made to which exception is taken by the respondents, has not acted ultra vires of the memorandum of association. But it is contended that, although this may be so, the effect of the agreements entered into by the company is such that the transaction cannot be carried out without the consent of all the debenture-holders, and, therefore, the non-assenting debenture-holders are entitled to claim payment in full. It seems to me that the right of the debenture-holders, who have only a floating charge on the undertaking and its assets, is clearly settled by the judgment of the House of Lords in *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (1), and I will quote only the language of Lord Macnaghten (2): "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes." In my opinion, in order to enable the debenture-holder to insist on payment of his debentures in such a case as this he must shew, either that the act complained of is ultra vires, or that, to use the language of Lord Macnaghten, "the undertaking has ceased to be a going concern," or that the terms of the debenture which he holds give him the express

(1) [1897] A. C. 81. (2) [1897] A. C. 86.

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right to veto or negative the operations which the company are proposing to carry out within their powers.

In my opinion, the facts in this case do not support any of the above positions. There is nothing in the debenture to prevent the company from carrying out this particular operation, if it is, as I hold it to be, within the memorandum of association; and in my opinion Farwell J. ought to have declined to give the plaintiff and the dissenting debenture-holders he represents any special rights in respect of the 16,800*l.* brought into court, and ought to have treated them as having the same rights as the debenture-holders who had assented.

For these reasons I think the appeal should be allowed with costs here and below.

RIGBY L.J. In this case North J., on an interlocutory motion, granted, on March 21, 1899, an injunction until the hearing, restraining the defendants from carrying out a sale of all their assets to the defendants De Friese and Borax Consolidated, Limited, without first making due provision for the payment of the debenture-holders whose assent to such transfer had not been obtained.

No previous authority is cited for such a finding when, as in the present case, the company is only doing what is plainly authorized by the memorandum of association, and a substantial and independent business has throughout remained to be carried on. [His Lordship then stated what took place on the appeal from the interim injunction, and the mode in which the agreements of November 29, 1898, and January 10, 1899, were carried into effect. His Lordship then proceeded :—]

The action came on for trial before Farwell J. It was then contended for the plaintiff that by the transfer of all its assets, except the 23,000*l.* or 24,000*l.* of securities, the company was brought into such a state that it was proper, at the suit of debenture-holders, to treat it as liable to be wound up, and that the plaintiff's debentures were immediately payable at par, which were the grounds on which North J. granted the interim injunction; but Farwell J., on the construction of the debentures and on a review of the facts, negatived these contentions,

and by the judgment on the trial, dated March 5, 1900, held that the plaintiff and all others the holders of the A and B debentures of the defendants, the Borax Company, Limited, have a continuing floating charge on all the property, undertaking, and assets of the defendants the Borax Company, Limited, but not on such of the said assets as were sold to the defendant De Friese and Borax Consolidated, Limited.

This declaration, in my judgment, entirely negatives the whole case made by the plaintiff and the grounds on which the interim injunction was granted. It is not appealed against by the plaintiff, and it is not, strictly speaking, open to this Court to discuss the grounds on which it is founded. I do not, however, differ from anything said by the Lord Chief Justice. The declaration actually made was entirely unnecessary, as there never was a doubt that, unless the sale were declared improper, the floating charge existed.

The declaration, however, is followed by an order establishing that the plaintiff, and all other the debenture-holders who had not assented to the sale, had a floating charge on the 16,800*l.* in court. In my judgment, this order—if it means, as no doubt it does, that the non-assenting debenture-holders are entitled to a floating charge to the exclusion of the others—is not only inconsistent with the previous declaration (since the 16,800*l.* is one of the assets of the company), but proceeds upon a wrong view of the order of the Court of Appeal of May 11, 1899, which did not give any charge on the fund not otherwise existing, but treated it as a fund available for compensation of dissenting debenture-holders only in case at the trial they should prove to have sustained damage by the sale and the sale itself should, as regards them, be held wrongful, neither of which events has been established.

The defendants, the Borax Company, Limited, ask to have the action dismissed with costs and the judgment in the Court below, except as to costs ordered to be paid by the plaintiff, reversed. It appears to me that they are entitled to this relief, the plaintiff having failed entirely.

The appeal should be allowed with costs, and the action dismissed with costs, and the judgment reversed, except as

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aforesaid; the costs of the action to include the costs of the motion for an injunction and of the appeal from the order made thereon.

VAUGHAN WILLIAMS L.J. I agree, but I think I ought to state my reasons.

It seems to me that Farwell J. by his judgment decided, first, that the contention of the plaintiff that the floating charge had attached, and the moneys payable thereunder had become payable before the due date, could not be supported; and it seems to me that the learned judge so decided on two grounds, one being that the company had not ceased to carry on business and the other that the debentures defined the events on the happening of which the debenture debt was to become payable before the due date, and that ceasing to carry on business was not one of those events.

Secondly, Farwell J. decided, following, as he said, the decision of North J., that the sales could not have taken place except upon the terms of substituting cash to the full amount of the claim of the dissentients for the full amount of the property taken away; that is to say, he decided that the sales, apart from the order of the Court of Appeal, were wrongful and liable to be restrained, not because such sales were ultra vires of the memorandum of association, but because the carrying out of such sales would be substituting a different charge from that given to the debenture-holders by the debentures.

Thirdly, Farwell J., construing the order of the Court of Appeal, decided that it did not mean that the parties to the contract of sale might go on at their peril upon bringing 16,800*l.* into court, but meant, "Bring into court 16,800*l.*, the total amount of the debentures of the dissentients, and on those terms complete your sale free from all incumbrances of those dissentients." Farwell J. thought that the effect of the order was that there should be no claim left against the assets taken by the purchasers, the consolidated company: the 16,800*l.* was to be substituted for so much of the assets.

I am not here discussing whether Farwell J. was right in so finding and holding. I am only saying that he did so find and

hold, and I think that the judgment as ordered must be construed in the light of what Farwell J. found and held. It seems to me perfectly plain that, although Farwell J. found against the plaintiff on his contention that he was entitled to immediate payment of the sum secured by the debentures on the ground that the company had ceased to carry on business, yet he plainly intended to decide the action in favour of the plaintiff, and that this is only intelligible by reference to the finding of Farwell J. that, except on the conditions imposed by the Court of Appeal, the sale was wrongful, and subject to be restrained because it would substitute a different charge from that given by the debentures.

Now, in the first place, I think that if the judgment of Farwell J. means that the order of the Court of Appeal did anything more than provide security for the satisfaction and discharge of the bonds of the dissentient debenture-holders, in case it should turn out on the trial that the plaintiff and the dissentient debenture-holders were entitled to have the defendant company restrained from carrying out the proposed sales without first making due provision for such satisfaction and discharge, the learned judge was wrong.

I think it clear that the 16,800*l.* was ordered by the Court of Appeal to be paid into court to the credit of the action merely as security for the plaintiff and the other dissentient debenture-holders in case the claim in the statement of claim should be established in principle. It is true that after the order of the Court of Appeal the plaintiff could not obtain an injunction by the judgment in the action, but he could obtain the alternative remedy of satisfaction, if he established that the proposed sales were such as ought not to be carried out without first making due provision for such satisfaction.

In my judgment there is nothing in the order of the Court of Appeal to exclude from the trial of the action the question involved in the claim (as it stood in the pleadings) for an injunction: that is to say, the question whether or not the sale was wrongful against the debenture-holders, and liable to be restrained at their instance, because it endangered their security; and to alter the security of the debenture-holders

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otherwise than in the ordinary course of business as authorized by the memorandum of association would, in my opinion, endanger the security.

The difficulty of the plaintiff is that it cannot be denied that generally it is true to say that a debenture-holder who takes a floating charge on the undertaking and property of a company cannot complain of anything which is done by the company intra vires and in the ordinary course of business; and Farwell J., following North J., has, in effect, held that the sale or amalgamation agreement of the company with De Friese was intra vires and in ordinary course of business, because he has held that, notwithstanding the sale, the company has not ceased to carry on business. This decision may be right or may be wrong, but it cannot be discussed because there is no appeal by the plaintiff against it.

To my mind, the real objection to this agreement is that, whereas the memorandum of association, clause (*a*), enables the company to carry on, in the United Kingdom, France, Germany, Belgium, Turkey and elsewhere as may for the time being be determined, the business of miners, refiners, distillers, and manufacturers of and dealers in (either wholesale or retail) boracite, borax, boracic acid, and any other similar ore, clause 10 of the agreement of sale by the company to De Friese contains the following provision: [His Lordship read the clause, and continued:—] This clause in the agreement seems by its very terms to preclude the company from exercising its powers in respect of an object included in the undertaking—an object as to which there are reasons contained in the terms of the memorandum itself for saying that it is the principal object and the other objects merely subsidiary.

For a company thus to preclude itself seems to me a very different thing from the non-exercise of a power, or from the selling of a part of the property of the company essential to carrying out an authorized object of the company, or even the chief object authorized by the memorandum. For a company thus to preclude itself seems to me, in effect, to be an alteration of the memorandum of association by excluding therefrom the objects which the company has agreed not to

exercise. It will be observed that the memorandum gives no power to sell the "undertaking," and the agreement did not purport to sell it. I am by no means sure that the debenture-holders were not, when they brought this action, entitled to the injunction claimed; but unfortunately the statement of claim, though it sets out clause 10 of the agreement, and alleges that the proposed sale will endanger the security, does not in terms complain of the clause as altering the nature of the undertaking by limiting it, and the point was never argued either before North J. or Farwell J.

The point was argued that the business as carried on after the sale could not be the business carried on when the debenture-holders lent their money, and on security of which they relied. This point seems to me a bad point, and to be merely the point against which Cozens-Hardy J. decided in *In re H. H. Vivian & Co., Limited.* (1) This is a very different question from the question whether the carrying out of an agreement containing a covenant by the company not to exercise its powers in respect of an object—and that the principal object—included in the memorandum can be restrained on the application of either shareholders or debenture-holders; but, as my brethren think that the point is not open now, I shall not discuss the matter further, but leave it open as far as I am concerned.

Solicitors: *Clements, Williams & Co.; Linklater, Addison & Co.*

(1) [1900] 2 Ch. 654.

G. I. F. C.

KEKEWICH J.

1900

Dec. 6, 18.

HALBOT *v.* LENS.

[1900 H. 325.]

Contract—Principal and Agent—Contract by Agent on behalf of Principal—Want of Authority—Liability of Agent—Knowledge of Want of Authority by other Contracting Party.

A person who purports to contract as agent on behalf of an alleged principal is liable on an implied warranty of his authority only if the other contracting party relied on the existence of authority in fact. He is not so liable if, at the time of purporting to contract, he expressly disclaimed any present authority.

Collen v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647, followed.

The observations of Mellish L.J. in *Beattie* v. *Lord Ebury*, (1872) L. R. 7 Ch. 777, 800, applied.

The proposition in *Smout* v. *Ilbery*, (1842) 10 M. & W. 11, that there must be some wrong or omission on the part of the agent in order to make him personally liable in respect of a contract made in the name of his principal, is negatived by *Collen* v. *Wright*.

In August, 1899, the plaintiff and the defendant, Bernard Clarke Lens, were carrying on business in partnership. On August 17 the firm convened a meeting of their creditors to consider a statement of affairs. Meetings were held on August 25 and 30, and an arrangement was come to whereby the creditors agreed to accept a composition of 12*s.* in the pound, payable in three instalments of 5*s.*, 5*s.*, and 2*s.*, at three, six, and nine months respectively, the last of such instalments to be guaranteed as provided. The rights of respective creditors against sureties were reserved in the usual way.

At the date of the arrangement the firm was indebted to its bankers in the sum of 15,802*l.* 10*s.* 9*d.*, for which the bank held as collateral security the separate guarantee of the plaintiff for 1000*l.*, a joint guarantee of the defendants, Bernard Clarke Lens and his wife Ethel Clarke Lens, for 4000*l.*, and a guarantee of Dr. Thomas Clarke, the father of the defendant Ethel Clarke Lens, for 5000*l.*

On September 1, 1899, the following document was signed by the plaintiff and the defendant Bernard Clarke Lens, Lens

signing "for self and wife and Dr. Clarke": "Memorandum as to understanding arrived at 1st September, 1899. 1. That an offer of 12*s.* in the pound having been made to the creditors, the estate is to be dealt with as follows: Mr. Halbot to take over the current business from date of stoppage (17th August, 1899), including all orders and contracts, also the stock which is already contracted to be sold, and book debts to the extent of invoices dated 17th August last and since, paying for such assets the price of the stock to be taken by him . . . . payment to be made to Mr. Lens in three months from 25th August. Mr. Halbot to take with the current business all such matters as should go with the goodwill of a business, and particularly all patterns of all descriptions and trade-marks, and Mr. Lens to bind himself not to compete during the next twelve months either on his own account or in the employment of any other house. All the remaining assets to be taken by Mr. Lens, who shall accordingly accept the burden of paying the composition to the creditors, including all costs. 2. Mr. Lens undertakes to use his best efforts to carry through the composition arrangement, and for that purpose he will pay in full preferential and secured claims, and if necessary the shippers and agents abroad, but he is not to be obliged to pay ordinary creditors more than the agreed composition upon their admitted debts. 3. All claims (if any) made or existing by Dr. Clarke or Mrs. Lens against Mr. Halbot to be released. 4. Mr. Halbot to accept the responsibility of meeting all claims (if any) to be made by manufacturers or customers in respect of breach of contract. 5. Mr. Lens to retain the books of account, the other books to be handed to Mr. Halbot subject to the right of Mr. Lens to inspect them at any time whilst he is selling the firm's stock."

The arrangement with the creditors was carried out on September 25, 1899, by the issue of composition bills, those for the first and second instalments being accepted by the firm, and those for the third instalment being accepted by the firm, and drawn and indorsed by the defendant Ethel Clarke Lens as a surety approved by the committee of inspection appointed by the creditors.

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Dr. Clarke repudiated the authority of the defendant Bernard Lens to sign the memorandum of September 1 on his behalf, and he refused to adopt it.

The plaintiff brought this action against the defendant Bernard Clarke Lens and the defendant Ethel Clarke Lens in respect of her separate estate, alleging that it was part of the agreement that the defendants should obtain the release by Dr. Clarke of all claims and demands by him against the plaintiff, and claiming a declaration that under or by virtue of the agreement of September 1, 1899, the defendants, or one of them, were bound to procure the release by Dr. Clarke of all claims by him against the plaintiff, and to indemnify the plaintiff therefrom; or, in the alternative, in the event of the defendant Ethel Clarke Lens repudiating the authority of her co-defendant to sign the agreement on her behalf, a declaration that the defendant Bernard Clarke Lens was bound to procure the said release, and also a similar release by his co-defendant, and to indemnify the plaintiff against all claims by her and Dr. Clarke.

The defendant Bernard Clarke Lens alleged in his defence that at the time of signing the agreement the plaintiff was informed, and he well knew, that the defendant had no authority to sign as agent for either his wife or Dr. Clarke, and, further, that he had been informed that Dr. Clarke had been asked to give a release and had declined to do so; and that the plaintiff and defendant B. C. Lens agreed to take the risk of Dr. Clarke refusing to be bound by the agreement.

From the judgment of his Lordship it will be seen that this defence was substantiated by the evidence in Dr. Clarke's case.

The defendant Ethel Clarke Lens in her defence alleged that she did not in fact authorize or empower her husband to sign the agreement on her behalf, and she did not hear of it until after it had been signed. She became aware of it in October, 1899, and did not at any time ratify it. Neither did she before the commencement of the action make any objection to it.

Warrington, *Q.C.*, and *Beddall*, for the plaintiff. We accept the view that the memorandum was signed without the autho-

rity of Dr. Clarke, but we cannot admit that there was no authority to sign on behalf of Mrs. Lens. A person who professes to enter into a contract on behalf of another person impliedly contracts that the authority which he professes to have does in fact exist, and if it turns out that it does not, he is liable upon that contract: *Collen* v. *Wright*. (1) On that ground the defendant Bernard Lens is liable in respect of the contract he professed to enter into on behalf of Dr. Clarke. If Mrs. Lens did not authorize the contract on her behalf, the plaintiff has the same right of action against Bernard Lens in her case also.

The measure of damages is what the plaintiff has lost by losing the contracts: *In re National Coffee Palace Co.* (2)

Renshaw, *Q.C.*, and *Methold*, for the defendants. To make an agent personally liable on a contract made in the name of his principal, there must be some wrong or omission on his part, and that cannot be if his want of authority is known to the party with whom he is contracting: *Smout* v. *Ilbery* (3); Chitty on Contracts, 13th ed. p. 274.

The question is really one of fact, whether the plaintiff had equal knowledge with Bernard Lens of his want of authority. If, as the defendants say, he had, the case is not within the principle of *Collen* v. *Wright* (1), which we do not call in question, and the plaintiff cannot succeed.

Warrington, *Q.C.*, in reply.

[KEKEWICH J. I do not think it is shewn that the plaintiff knew that Bernard Lens could not bind Mrs. Lens; and in her case it is the ordinary case of a person representing that he could bind another when he could not.]

As regards Dr. Clarke, the contract was, in effect, a contract by Lens that Dr. Clarke's claims should be released. If so, although he had no authority to sign for Dr. Clarke, he is none the less liable on his own contract, and it can make no difference that he has signed for Dr. Clarke as well as for himself. *Smout* v. *Ilbery* (3) was decided fifteen years before *Collen* v. *Wright* (1), and the law must be taken to be as laid down in the later case.

(1) 7 E. & B. 301; 8 E. & B. 647. (2) (1883) 24 Ch. D. 367.
(3) 10 M. & W. 1.

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If the liability of the agent is on contract, it is not material that the other party knew that he had no authority. He is liable on the contract which he made when purporting to act for his principal, i.e., the contract that he had authority to act. There is another way in which it might be put—an agent who knows that he has no authority can contract that a third party will do something, or, if not, that he himself will do it. In that case, knowledge of want of authority by the other contracting party is not material.

Cur. adv. vult.

Dec. 18. KEKEWICH J. Before discussing the question which was mainly argued, and which is one of considerable importance, I must deal with the point urged on behalf of the plaintiff turning on the construction of the 3rd clause of the memorandum of September 1, 1899. That memorandum was intended to operate as an agreement, and it is properly pleaded as an agreement in the statement of claim; but it is not beside the question to observe that it is not expressed to be made between parties, and that it is intituled "Memorandum as to understanding arrived at 1st September, 1899," from which it might be inferred that the document was intended to contain the terms on which an agreement was to be made rather than the agreement itself. The 3rd clause runs thus: "All claims (if any) made or existing by Dr. Clarke or Mrs. Lens against Mr. Halbot to be released." The argument on behalf of the plaintiff was that, inasmuch as Mr. Halbot was to be released, therefore this expressed an agreement by Mr. Lens that he would procure a release for the benefit of Mr. Halbot. I do not think that a fair construction of the clause standing alone. It is not expressed as an agreement that any one person would procure a release, but rather as a condition of the entire agreement that there should be some release, and, by referring to clauses 2, 4, and 5, it is seen that when it was intended that anything should be done by either Mr. Halbot or Mr. Lens it was so stated in plain language.

Now we come to the question whether the defendant Bernard Lens is liable in damages to the plaintiff for not

having procured the concurrence of Dr. Clarke and Mrs. Lens on the ground that he purported to sign the memorandum on their behalf as well as on his own. It is agreed that the law on this subject is adequately expounded in the judgments in *Collen* v. *Wright*. (1) Study of the judgments delivered in the Queen's Bench and in the Exchequer Chamber shews that there was no doubt in the mind of any of the judges what was the question falling for decision, and, indeed, this is as clearly stated in the dissentient judgment of Cockburn C.J. (2) as it is in the judgment of the majority of the Court of Exchequer Chamber delivered by Willes J. I could cite many passages by way of illustration, but will take one only from the judgment of Cockburn C.J. His words are as follows (2): "The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract." That proposition was in effect affirmed by the Court of Queen's Bench and by the majority of the Court of Exchequer Chamber. That decision does not proceed on the footing of there having been any wrong, or omission of right, on the part of the agent in order to make him personally liable in respect of a contract made in the name of his principal, and the conclusion in *Smout* v. *Ilbery* (3), that such wrong or omission of right on the part of the agent is necessary, must be taken to have been negatived by *Collen* v. *Wright* (1), which was decided fifteen years later. The conclusion, therefore, is that, in order to enable a plaintiff to maintain an action on such a contract, he must prove a misrepresentation in fact—that is to say, a representation by the defendant that he was authorized to sign on behalf of an alleged principal when in fact he was not so authorized—but he need not prove that this misrepresentation was due to an omission or wrong of the party signing. The decision in *Collen* v. *Wright* (1) is briefly

(1) 7 E. & B. 301; 8 E. & B. 647, 658.

(2) 8 E. & B. 658.

(3) 10 M. & W. 1, 11.

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summarised on these lines by Mellish L.J. in *Beattie* v. *Lord Ebury* (1), to which case I must again presently refer. If, therefore, the case against the defendant Bernard Lens simply is that, having no authority to sign on behalf of his wife or Dr. Clarke, he nevertheless did sign, as in fact he did, as their agent, he must be regarded as having entered into a contract that he had authority so to sign—that is, to bind them—and if there were no such authority he must be held to have made a misrepresentation in fact which renders him liable to an action on the implied contract. The defendant Ethel Clarke Lens never authorized her husband to sign the memorandum on her behalf or to agree to its terms. He thought that he had such authority, or that she would ratify his bargain on her behalf, and the plaintiff apparently took this for granted. The proposition affirmed by *Collen* v. *Wright* (2) is to this part of the case directly applicable, and the plaintiff is entitled to judgment on that footing. There was some discussion about the measure of damages, but the principle is well settled, and I do not anticipate any difficulty in applying it to the case in dispute. Therefore I say no more about that now.

The case against the defendant Bernard Lens on the alleged misrepresentation that he had authority to sign for Dr. Clarke stands on a different footing. The result of the evidence is, I think, clearly to establish that both the plaintiff and the defendant Bernard Lens equally knew, not merely that the defendant Lens had no authority to bind Dr. Clarke, but that Dr. Clarke had positively declined to assent to the terms of the agreement so far as they affected him. Is it possible under these circumstances to say that the defendant Bernard Lens made a representation of fact? There is a passage in the judgment of Mellish L.J. in *Beattie* v. *Lord Ebury* (3) which to my mind throws much light on this question. He had alluded to certain cases, of which *Collen* v. *Wright* (2) was one, and he said: "But if those cases are examined it will be found in all of them that there was a misrepresentation in point of fact as to the agent having power to bind his principal, and though I

(1) L. R. 7 Ch. 777, 801. (2) 7 E. & B. 301; 8 E. & B. 647.
(3) L. R. 7 Ch. 800.

have not found any case in the Courts of Law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable."

The case put by the Lord Justice is not on all fours with that with which I have to deal here, but it strongly accentuates the position that in order to maintain such an action there must be misrepresentation in fact trusted by the person to whom it is made, and I cannot myself see how a man can be properly said to have made such a representation when in truth and substance he has said, "Although I will, if you wish it, sign this on behalf of the alleged principal, I tell you plainly that I have no authority from him to do so, and have every reason to believe that such authority will not be forthcoming." A man, of course, might say, "I have no authority, and probably cannot obtain such authority, but yet I will contract to obtain it, and run the risk of damages." Such a contract is conceivable, and would be good in law, but ought not, I think, to be inferred except from facts leading directly to that conclusion, and I do not find those facts here. I think it far more likely that it was agreed between the parties that the defendant Bernard Lens should add his signature on behalf of Dr. Clarke for what it was worth, each party recognising that it was in all probability worth nothing. In my judgment, therefore, the plaintiff has failed to establish misrepresentation of fact against the defendant Bernard Lens as regards his signature on behalf of Dr. Clarke, and as regards that the action is not maintainable.

The result is that the plaintiff has succeeded in part and failed in part. I do not see my way to distributing the costs otherwise than on the principle of equality, and the plaintiff will, therefore, have such judgment as he is entitled to without costs.

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[His Lordship dismissed the action with costs as against the defendant Ethel Clarke Lens, and dismissed so much of the action as claimed relief on the footing that the defendant Bernard Clarke Lens was bound to procure a release by Dr. Clarke, and to indemnify the plaintiff against claims by him. And he declared that the defendant Bernard Clarke Lens was bound to procure the release of the defendant Ethel Clarke Lens, and to indemnify the plaintiff against all claims by her.]

Solicitors: *Clarke & Blundell, for Gordon, Hunter & Macmaster, Bradford; Nussey & Fellowes, for Vint, Parkinson, Hill & Killick, Bradford.*

C. C. M. D.

KEKEWICH J.
1901
Jan. 16, 28.

In re PITT RIVERS. SCOTT *v.* PITT RIVERS.

[1900 P. 2431.]

Charitable Gift—Secret Trust—Trust for Benefit of Public, but so that they should acquire no Rights.

A testator established a museum and laid out a portion of his estate as a pleasure ground, and maintained the same for the benefit of the public, whom he admitted thereto under certain restrictions while reserving to himself his private rights, and he devised and bequeathed the museum and pleasure ground and an annuity of 300*l.* for the maintenance of the same to his son. The evidence established a secret trust to maintain the museum and pleasure ground, and allow the public access thereto as theretofore, but so that the public should acquire no rights:—

Held, that the intention not to give the public any rights must yield to the intention that the property should be maintained as theretofore, and that this was a trust enforceable for the benefit of the public.

ORIGINATING SUMMONS.

The main question raised by this summons was whether a devise by General Pitt Rivers, deceased, of a museum and pleasure ground at Farnham in Dorsetshire was subject to a secret trust for the benefit of the public.

The testator, who lived at Rushmore, on the borders of Wiltshire and Dorsetshire, purchased a house, adjoining his Rushmore estate, known as the Gipsy School, and converted it

into a museum for exhibiting articles and specimens which he had collected. This collection included relics of antiquarian and archæological interest found at Rushmore, and also several series of industrial, metallurgical, agricultural, and fictile objects from all parts of the world. The museum was open to the public all through the year, Sundays included, and was placed by the testator in the charge of a caretaker. A further part of the Rushmore estate, known as the Larmer grounds, was laid out by the testator as a pleasure ground, to which the public were admitted under certain restrictions. In these grounds the testator had built a theatre, where concerts and dramatic recitals were given at the testator's expense, and he also provided a band which played every Sunday afternoon in the summer months. The testator made no charge for admission, but he insisted that the privileges which he allowed to the public should not be enjoyed as of right, and he put up notices in the Larmer grounds stating that the grounds were private property, and that persons found trespassing therein would be prosecuted, and that the gate to the grounds would be kept locked once in every year from sunrise to sunset.

The testator, by his will dated June 12, 1892, after appointing executors and trustees, devised his freehold hereditaments in the counties of Dorset, Hants, and Wilts, or elsewhere in England—which devise included the museum and Larmer grounds—to his said trustees upon trusts to raise out of the income thereof certain rent-charges in favour of his widow and children; and subject thereto he devised his said estates to his first and other sons successively for life and then in tail male. By a codicil dated November 20, 1899, the testator made the following bequests: "(1.) I bequeath my museum at Farnham in the county of Dorset, together with its contents, and the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum, to my eldest son, Alexander Edward Lane Fox Pitt" (afterwards Pitt Rivers) "and his heirs male; (2.) I bequeath my Larmer grounds in the parishes of Farnham Royal and Tollard Royal, in the counties of Wilts and Dorset, to my said eldest son A. E. L. Fox Pitt and his heirs male; (3.) I also bequeath unto my said eldest

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son and his heirs male the sum of 300*l.* per annum; the said sum of 300*l.* per annum is to be for the future maintenance of the said museum and Larmer grounds and the articles of interest therein and thereon; (4.) I direct that the said museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation; and I further direct that the said sum of 300*l.* is to be a further charge upon my estates in the counties of Wilts and Dorset; (5.) I appoint my son-in-law John Lubbock Bart." (now the Right Hon. John, Baron Avebury) "and Charles Hercules Read to be the trustees only for the purposes so far as necessary in connection with the future maintenance of the said museum, Larmer grounds, and the objects of interest therein and thereon."

The testator made several other codicils to his will not material to the present question, and he died on May 4, 1900. The testator had had frequent conversations with his eldest son and with his solicitor with reference to the disposition of the museum and Larmer grounds; and the question arose whether the effect of these conversations was to impress upon the property given by the codicil of November 20, 1899, a secret trust in favour of the public.

This summons was accordingly taken out by the acting executor of the will and codicils of the testator against Alexander Pitt Rivers, Henry George Pitt Rivers, his eldest son, an infant, and Lord Avebury and C. H. Read, the so-called trustees of the codicil, to determine—(1.) whether the defendant, Alexander Pitt Rivers, took an estate tail or any other and what estate in the museum and Larmer grounds, and whether beneficially or upon any and what trusts; (2.) whether the same defendant took any and what estate, and whether beneficially or upon any and what trusts, in the contents of the museum at Farnham and the objects of curiosity at Rushmore; (3.) whether any and what articles at Rushmore passed under the gift in the 1st clause of the codicil; (4.) what estate, and whether beneficially or upon any and what trusts, the same defendant took in the 300*l.* per annum bequeathed by the 3rd clause of the codicil; (5.) whether the defendants, Lord Avebury and C. H.

Read, took any and what estate in the museum and its contents and the objects of curiosity mentioned in the 1st clause of the codicil, and the Larmer grounds and the objects of interest therein and thereon, and the annuity of 300*l.* respectively, or any and which of them, and whether they were under any and what duties in connection with the future maintenance of the museum, Larmer grounds, and the objects of interest therein and thereon; and (6.) whether the gifts of the museum and its contents and the objects of curiosity at Rushmore, and of the Larmer grounds, and of the annuity of 300*l.* respectively, or any of them, failed as infringing the rule against perpetuities or otherwise.

The defendant Alexander Pitt Rivers, while expressing his willingness to carry out the testator's wishes, disputed the claim of the public to any rights over the museum and Larmer grounds. It was common ground that the intention of the testator to be inferred from conversations which had passed between him and his son and the solicitor who had framed the codicil of November 20, 1899, was that the museum and grounds should be maintained by the son in the same way as theretofore, but that the public should not enjoy any further privileges than they had been allowed in the testator's lifetime, but there was a slight discrepancy in the evidence upon the question whether the testator had intended to impose a secret trust upon his son or to leave the matter to his discretion.

The result of the evidence is stated in the judgment.

Sheldon, for the plaintiff.

P. O. Lawrence, Q.C., and *W. M. Cann*, for the defendant Alexander Pitt Rivers. The Crown must prove a trust imposed on the devisee and accepted by him, and the trust must be for the benefit of the public. The testator always retained control over this property, and did not intend to take it out of Rushmore. He, no doubt, expressed a hope that his son would maintain the museum and the pleasure ground in the same way as they had been maintained during his life; but that did not amount to a trust. The fact that the property is given in tail instead of in fee is opposed to the notion of a trust. The

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trust claimed by the public is inconsistent with the private rights reserved by the testator.

Sir R. B. Finlay, A.-G., and *R. J. Parker*, for the Crown. The gift of the 300*l.* a year for the maintenance of the museum and grounds, coupled with the appointment of special trustees for that purpose, shews that the testator did not intend to allow his son to do as he chose in this matter.

The testator wished to keep the land in the hands of the devisee, and he also meant the public to be admitted as they had been during his lifetime, whilst giving to his son a wide discretion as to the mode in which this should be effected. The grounds and the museum were to be kept up as before; at all events, to the extent of the annuity of 300*l.*

The law as to secret trusts is to be found in *Jones* v. *Badley*. (1) Both the questions which are there stated by the Court, namely, as to the intention of the testator to create a trust and as to the acceptance of the trust by the devisee, must here be answered in the affirmative.

There is now no legal prohibition against this property being held for charitable purposes: see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 3, 5, 8. We therefore ask for a declaration that a valid charitable trust has been established.

Warrington, Q.C., and *P. S. Stokes*, for the defendant H. G. Pitt Rivers.

Renshaw, Q.C., and *F. L. Wright*, for the defendants Lord Avebury and C. H. Read.

Lawrence, Q.C., in reply.

Cur. adv. vult.

Jan. 28. KEKEWICH J. By the codicil of November 20, 1899, General Pitt Rivers gave to his eldest son, the first defendant, to whom I will for brevity's sake refer as Mr. Fox Pitt Rivers, (1.) his museum at Farnham with its contents; (2.) the objects of curiosity in his house at Rushmore which were intended to be placed in the said museum; (3.) his Larmer grounds; and (4.) the sum of 300*l.* per annum. All

(1) (1868) L. R. 3 Ch. 362.

these gifts were made to Mr. Fox Pitt Rivers and his heirs male, so that he took what was real estate as tenant in tail and what was personal estate absolutely. I think that the gift of 300*l.* per annum falls under the latter description. It is by the same codicil charged on the testator's estates in the counties of Wilts and Dorset; but that charge does not prevent the bequest from being one of an annuity which is personal estate. The result is that Mr. Fox Pitt Rivers can deal with the real and personal estate, thus given, as he pleases, and that, notwithstanding that the testator has directed on the face of the codicil that the museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation, and has indicated his intention that the annuity of 300*l.* shall be available and shall be used for that purpose, such direction and intention cannot interfere with the beneficial gifts of the construction of which there is no reasonable doubt. But it has been disclosed by the evidence that the testator communicated his wishes to his son, Mr. Fox Pitt Rivers, and that his son accepted the gifts with the knowledge that they were made to him for the purpose of effecting his father's wishes; and, further, that he assured his father that those wishes should be fulfilled. This constitutes a secret trust of the property given, enforceable against the son in this Court. There is no need to refer to authorities or to examine the doctrine of the Court on the subject, because the facts just mentioned are undoubted, and the doctrine of the Court, that a secret trust is under such circumstances enforceable, is perfectly well settled. Nor is there any occasion narrowly to examine the evidence to ascertain what the communicated and accepted wishes of the father were. He had established the museum and had appropriated the Larmer grounds for purposes in connection with it, and he had maintained the museum and the grounds for the benefit and instruction of the public. He had done more than that, for he had expended money and trouble in providing entertainment for the public outside and beyond what would be derived from a mere visit to the museum and grounds. It may well be that, when he exacted a promise from his son that he would maintain the museum and grounds

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as heretofore, he did not bind him to provide the extra entertainment to which I have just referred; but he certainly did intend him to maintain the museum and grounds and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done. So far there is no substantial difficulty. Questions might arise in detail how the wishes of the father and the promise of the son should be effected; but they would be merely questions of detail, and none of principle would be possible.

Now comes the circumstance which raises a question of difficulty on which I reserved my judgment. While giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore, the testator insisted that the public should have no rights. The public were to be allowed to use and enjoy the museum and grounds, but were to acquire no rights. This notion seems to have been strongly implanted in the testator's mind, and he referred to it frequently. He, being owner in fee, was able during his lifetime to do what was necessary to prevent the acquisition of rights by the public; and he occasionally closed the museum and grounds with the express intention of shewing that he retained his paramount right as owner. Probably he thought that his son could do the same, and, of course, if the son had succeeded to his father's position—that is, had taken the property absolutely unfettered by any trust—the son might have adopted the same lines as his father, and prevented the enjoyment of the public as a matter of right. This could only have been done by vesting the property absolutely in the son, and leaving it to his good faith and discretion to fulfil his father's wishes, though leaving him at the same time at liberty entirely to defeat these wishes if so minded. As it is, a trust has been established, and the question arises how far that trust can be enforced consistently with the denial of rights to the public.

The Attorney-General appears to support the public character of the trust. He is altogether out of court unless he represents the public, and he cannot succeed in his contention that there is a secret trust to be enforced unless he further establishes

that it is a trust for the benefit of the public. The Court, therefore, finds itself in this embarrassing position. If it accedes to the contention of the Attorney-General, that there is a secret trust to be enforced for the benefit of the public, it must ignore or defeat the express intention of the testator that the public shall acquire no rights; and, on the other hand, if that contention is rejected and the trust be not enforced, the only alternative can be that Mr. Fox Pitt Rivers will be left absolute owner of the property in question, at liberty, if he pleases, to disregard his father's wishes, and treat the property as at his disposal no less than if no trust had been communicated to and accepted by him. I have not forgotten that it may, and probably will, be possible so to provide for the management, use, and enjoyment of the grounds and museum that Mr. Fox Pitt Rivers will be left in possession, and that for all practical purposes he will have such privileges of ownership as were enjoyed by his father; but nevertheless, considering the legal position, one must face the two alternatives to which I have called attention, and from which, it seems to me, there is no possible escape. Whichever alternative is right, and is adopted, there will necessarily be some departure from the testator's intentions—that is, in some respects those intentions will remain unfulfilled.

After full consideration I have arrived at the conclusion that the secret trust must be enforced at the suit of the Attorney-General, and for the benefit of the public. This will preserve the legal ownership of the son, which the father intended him to have; it will also fulfil his intention, as far as it can be fulfilled, that the museum and grounds shall be maintained as heretofore, and will avoid the possibility of the property being diverted from its intended purpose, which would be open if the son were declared beneficial as well as legal owner. I give credit to Mr. Fox Pitt Rivers for honest intention to do his very best to fulfil his father's wishes; but that creates at best only an imperfect obligation; and I must take it on the evidence that this would not have satisfied the father, who desired to secure the maintenance of the museum and grounds. On the other hand, there will be something less than complete

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fulfilment of the father's expressed wishes. But, in giving effect to wishes and trusts declared in the language of laymen and not in that of technical lawyers, one must be prepared to find that in some respects there will be failure and imperfection in detail, and one must be content to secure the substance even on those terms. Here the wish not to give the public rights, though strongly entertained and insisted on, may properly be regarded as a minor matter in comparison with the more important provision that the museum and grounds should be maintained as hitherto. I propose to declare the construction of the will on the points mentioned, and further to declare that it has been established to the satisfaction of the Court that the gifts to the son were made to Mr. Fox Pitt Rivers, and were accepted by him, for the express purpose that the museum and grounds should be maintained and used as they had been in the lifetime of the testator, and so that he and those claiming through or under him will hold the property subject to a trust for such maintenance and user. If to these declarations be added liberty to Mr. Fox Pitt Rivers or any person claiming through or under him, or the Attorney-General, to apply touching any question respecting such maintenance and user, that will suffice for the present as regards what I have thus far discussed.

There are two further questions arising on the codicil. First, it remains to be determined what are "the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum." [As to that his Lordship directed an enquiry following the language of the codicil, and he continued as follows:—]

The other question is what, if any, interest Lord Avebury and Mr. Charles Hercules Read take in any, and what, property disposed of by the codicil. It is obvious that the testator intended them to occupy some position of trust—that is, to have some duties and responsibilities—for he appoints them trustees for the purposes so far as necessary in connection with the better maintenance of the museum and grounds, and the objects of interest thereon and therein, but he directly gives them no property of any kind; and I do not think they can be

held to take any interest in the annuity of 300*l.*, which is expressly given to Mr. Fox Pitt Rivers. In coming to the conclusion that they took no estate or interest in anything, and have no duties to perform by virtue of the codicil, I am, of course, failing to give effect to what well may be supposed to have been the testator's intention; but I do not see my way to implying any estate, interest, or duty where none is expressed. If I were now settling a scheme, I should suggest for the consideration of the Attorney-General whether it would not be right and convenient to make these gentlemen trustees for the purposes of such scheme and to give them some definite position and duties under it; but this is not at present proposed, and I must leave the matter there.

Solicitors: *Tathams & Pym; Kennedy, Hughes & Ponsonby; Solicitor to the Treasury; C. R. Woolley.*

H. B. H.

HAYNES *v.* FOSTER.

[1892 H. 223.]

Election—Compensation — Married Woman — Restraint on Anticipation—Removal of Disability.

A testator, who owned land in Turkey, by his will directed it to be sold and the proceeds treated as part of his residuary estate, and he gave an interest in his residuary estate to a married daughter coupled with a restraint upon anticipation. By the law of Turkey the testator had no power to dispose by will of the proceeds of sale of the Turkish property, which became divisible amongst his children. Pending an application for payment out of court of the proceeds of sale, the married daughter became a widow:—

Held, that the testator by adding the restraint on anticipation shewed an intention inconsistent with the application of the doctrine of election, and that that intention was not affected by the fact that the daughter had subsequently become discovert:

Held, therefore, that she was not bound to compensate out of her interest in the residue those who were disappointed by the Turkish property not being dealt with as directed by the will.

Hamilton v. *Hamilton*, [1892] 1 Ch. 396, commented upon.

MORGAN HUGH FOSTER, who owned land in Turkey, by his will, dated November 1, 1888, directed his Turkish estates

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to be sold and the proceeds held as if the same were moneys arising from the conversion of his residuary personal estate. The testator bequeathed his residuary personal estate upon trusts for conversion and investment, and upon trust, after the death of his wife, to set apart investments representing two sums of 8000*l.* each, and to stand possessed of the residue of the investments upon trust for Arthur Foster for life, and after his decease upon the usual trusts in favour of his children, and on default or failure of issue to stand possessed of the same upon the trusts thereinafter respectively declared of the investments representing the two sums of 8000*l.* And as to the investments representing the first sum of 8000*l.* the testator directed his trustees to stand possessed thereof upon such trusts in favour of his daughter Lady Thomas and her issue as should correspond with the trusts thereinbefore declared in favour of his son Arthur Foster and his issue, but so, nevertheless, that his said daughter should not have power to deprive herself by way of anticipation of the annual produce to which she should so become entitled for her life, and should take the same for her sole and separate use, and on default or failure of issue further trusts were declared in favour of the testator's two other children; and as to the investments representing the second sum of 8000*l.* the testator directed his trustees to stand possessed thereof upon such trusts in favour of his daughter Lady Lacon and her issue as should correspond with the trusts thereinbefore declared in favour of Lady Thomas and her issue, and with the like further trusts on default or failure of issue in favour of the testator's two other children.

At the date of the will Lady Thomas was the wife of Sir George Sidney Meade Thomas, Bart., and Lady Lacon was the wife of Sir Edward Broughton Knowles Lacon, Bart.

The testator died on June 15, 1891, and his wife died on November 14, 1892. It appeared that by Turkish law the testator had no power to bequeath the proceeds of his Turkish estates, and that on the death of the testator's widow those estates were vested as to two fourth shares in Arthur Foster, as to one fourth share in Lady Thomas, and, as to the remaining fourth share, in Lady Lacon.

By an action commenced in 1892 by E. C. Haynes, who was a trustee of the marriage settlements of Lady Lacon and Lady Thomas, the plaintiff claimed to have the Turkish property sold and the rights of the parties to the proceeds determined, and under orders made in that action this property had since been sold and the proceeds paid into court.

This was a petition by the plaintiff in the action for the payment out of court of the proceeds of sale in accordance with the rights of the parties, and it raised a question as to election and as to the right to compensation of persons affected by the property of the testator in Turkey not being dealt with as directed by his will.

Since the presentation of this petition Lady Lacon had become a widow, Sir Edward Lacon having died on August 11, 1899.

P. O. Lawrence, Q.C., and *George Henderson*, for the petitioner.

Warrington, Q.C., and *Beaumont*, for Arthur Foster. If Arthur Foster is put to his election and is bound to compensate those who are disappointed by the Turkish property being taken out of the will, it is his interest to say that his sisters are also put to their election. Lady Thomas is restrained from anticipation, and it cannot be contended that she is put to her election: *In re Vardon's Trusts*. (1) That case shews, first, that the doctrine of election is based on the presumption of a general intention on the part of the settlor that all the provisions of the instrument shall be carried into effect; and, secondly, that a restraint on anticipation is an expression of an inconsistent particular intention which excludes the application of the doctrine. But Lady Lacon is put to her election, she being now a widow, because the particular intention lasts only so long as the restraint on anticipation continues in operation. The election applies to the benefits she takes under the will, but, so far as the restraint operates, effect cannot be given to it. When the coverture is removed, there ceases to be any particular intention, and the general intention applies. Although Lady Lacon

(1) (1885) 31 Ch. D. 275.

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was a feme covert at the time when the will came into operation, the time for election is now when the fund comes to be divided: *Codrington* v. *Lindsay* (1); *Hamilton* v. *Hamilton*. (2)

Austen-Cartmell, for Lady Lacon. Lady Lacon is not bound to elect. The rights of the parties were crystallized at the testator's death, and at that date the only fund out of which Lady Lacon could make compensation was her life interest in the 8000*l*., and as to that, she being then covert, she was restrained from anticipation. The restraint on anticipation operates as the expression of a particular intention which abrogates the general rule. There being, therefore, no fund out of which Lady Lacon could make compensation, no question of election can arise: *In re Wheatley* (3); *In re Vardon's Trusts*. (4) It is true that in both those cases the lady was covert at the time of the action, but in neither is there any indication that the lady's interest on becoming free from anticipation could be applied in making compensation. The principle on which those cases proceeded is illustrated by *In re Whitwell*. (5) Beyond enunciating the principles on which the doctrine of election is based, *Codrington* v. *Lindsay* (1) has no application to this case.

As to *Hamilton* v. *Hamilton* (2), North J. did not give the reasoning which induced him to arrive at the conclusion that the lady's interest could be impounded when the coverture ceased, and, unless that case is distinguishable from the present, it is upon this point inconsistent with the previous authorities, and ought not to be followed.

Dighton Pollock, for Lady Thomas.

Warrington, Q.C., in reply.

Cur. adv. vult.

Jan. 30. KEKEWICH J. A somewhat curious question arises in this way. The testator, Morgan Hugh Foster, was the owner of some lands in Turkey, and by his will he purported to direct those lands to be sold, and he further directed

(1) (1873) L. R. 8 Ch. 578; affirmed by the House of Lords sub nom. *Codrington* v. *Codrington*, (1875) L. R. 7 H. L. 854.

(2) [1892] 1 Ch. 396, 405.

(3) (1884) 27 Ch. D. 606.

(4) 31 Ch. D. 275.

(5) W. N. (1890) 171.

the proceeds of sale to be held by the trustees of his will as if the same were moneys arising from the conversion of the residue of his personal estate. He disposed of the residue of his personal estate in such manner as to give interests therein to his three children, Arthur Foster, Lady Thomas, and Lady Lacon. It turns out that according to the law of Turkey the testator had not the power which he purported to have of disposing of the proceeds of sale of land in that country, and the result is that such proceeds are divisible as on an intestacy between his three children aforesaid, who take them, of course, not under the will, but by inheritance. If they insist on this title they are bound, according to what is styled the doctrine of election, to compensate out of the interests which they nevertheless take under the will those who thereby lose the benefits which the testator intended for them in the proceeds of sale of the land in Turkey. I do not find it necessary here to expound the doctrine of election, or to do more than state as I have done its application in a concrete form to this particular case. But in stating the effect of the will I have intentionally omitted one provision which gives rise to the question falling for decision. Arthur Foster takes such interest as is given to him in the residue for his own benefit, without more, and the application of the doctrine of election is simple; but as regards Lady Thomas and Lady Lacon, their interests are coupled with restraint on anticipation, and it is that which has occasioned difficulty. I will say no more now about Lady Thomas, but deal with the case of Lady Lacon only. It is urged on her behalf that application of the doctrine of election is excluded by this restraint on anticipation, and to that it is replied that whether this might otherwise have been the correct conclusion or not, it is incorrect as matters stand, because Lady Lacon became a widow in August, 1899, and thereupon the restraint on anticipation ceased to have any effect. On this point several authorities were cited, and they must be noticed. Let me first say that *Codrington* v. *Lindsay* (1), reported in the House of Lords as *Codrington* v. *Codrington*, does not seem to me to have any real bearing on the case in

(1) L. R. 8 Ch. 578; L. R. 7 H. L. 854.

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hand. It is a well-known authority of great value, and most instructive, much learning on the doctrine of election being found in the judgments of the learned judges who took part in the decisions. But the point with which I am dealing did not arise, and could not have arisen there, and for the present purpose it cannot be regarded as a guide to any conclusion. My particular attention was called to the decision of the Court of Appeal (1), that the plaintiff was bound to account only for income received from the date of the order nisi for the dissolution of her marriage, but, apart from the observation that the grounds for this conclusion are not stated, study of the case has convinced me that it does not give me any assistance. A more important and useful case is *In re Vardon's Trusts* (2); but before commenting on that I must mention *In re Wheatley*. (3) In the latter case the claim of a married woman against a will would clearly have brought her within the doctrine of election, but that her interest under the same will out of which compensation was sought to be made was restrained from anticipation, and Chitty J. held that this restraint excluded application of the doctrine. His views are clearly and forcibly expressed in the judgment (3), and briefly come to this, that by adding the restraint on anticipation the testator must be taken to have expressed his intention that the married woman should not be able to part with the interest given to her, and, therefore, must also be taken to have intended that she should not be at liberty to make that compensation which is the necessary consequence of the application of the doctrine of election. He held it to be a question of intention, and in substance said that you cannot properly insist on a beneficiary under a will giving effect, as far as possible, to all the testator's dispositions, if you find him expressing the intention that the means of doing this shall be withheld. The same learned judge took the same view in *In re Whitwell* (4), which I think calls for no further comment. The case of *In re Vardon's Trusts* (5) first came before Kay J., and that

(1) L. R. 8 Ch. 578, 593.
(2) (1884) 28 Ch. D. 124; 31 Ch. D. 275.
(3) 27 Ch. D. 606, see especially at pp. 612, 613.
(4) W. N. (1890) 171.
(5) 28 Ch. D. 124.

learned judge held that a restraint on anticipation was no bar to the application of the doctrine of election, and that the Court could insist on the married woman making compensation to those whose interests she defeated, notwithstanding such restraint. He did not consider the question of intention at all. He only considered whether, in a case to which the doctrine of election would otherwise have been applicable, the restraint on anticipation—that is to say, the inability on the part of the lady to alienate—created any difficulty, and he held that it did not. But the case went to the Court of Appeal (1), and that Court took a different view. The judgment of the Court of Appeal was delivered by Fry L.J., and it rests on intention. It is to be observed that that was a case of a settlement and not of a will, and some different considerations may be applicable to the two different instruments because, as stated by Lord Redesdale in *Birmingham* v. *Kirwan* (2) in a passage which is cited with approval by Lord Hatherley in *Codrington* v. *Codrington* (3), "deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires." The judgment, however, does not distinguish between the two classes of instruments, and treats the intention as paramount in both alike. The key to the judgment of the Court of Appeal is to be found in the 3rd paragraph on page 280, which concludes thus: "This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it." Chitty J.'s judgment in *In re Wheatley* (4) had been discussed before Kay J., who disapproved of it, but was cited again in the Court of Appeal, and, though not expressly approved by the judgment, must, I think, be treated as upheld by it. If then Lady Lacon were still a married woman, it would follow that the restraint on anticipation of her interest in the residue renders it impossible for her to make compensation thereout, and excludes the doctrine of election. But then it is urged that, she being now discovert, the restraint has ceased to exist, and compensation is therefore possible. If

(1) 31 Ch. D. 275.
(2) (1805) 2 Sch. & Lef. 444, 449.
(3) L. R. 7 H. L. 867.
(4) 27 Ch. D. 606.

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I am right in the view which I have taken of Chitty J.'s decision in *In re Wheatley* (1) and of the decision of the Court of Appeal in *In re Vardon's Trusts* (2), it matters not whether Lady Lacon is now discovert or no. You must look to the will to ascertain what the testator's intention was, and if the testator has said that he intends her not to be capable of alienating her interest, that is, to be incapable of making that compensation thereout which the doctrine of election requires, then, because he has expressed that intention, the doctrine of election is excluded. Against this view reliance is placed upon the decision of North J. in *Hamilton* v. *Hamilton*. (3) He there held that a lady entitled to repudiate a settlement made by her when under age was bound to make compensation out of other interests under the same settlement to those whom she thus defeated, and I cannot read his judgment, which I have done with some care, without surmising that, if the lady had at that time been discovert, he would have obliged her to make compensation notwithstanding that the settlement contained a restraint on anticipation. But this was not the point decided. It was argued that the restraint on anticipation contained in the settlement contemplated only the marriage on which the settlement was made, and therefore had no application to the subsequent coverture in existence when the case was heard. This argument he rejected, and decided that the restraint was applicable to the then existing coverture. The other point was that she had exercised her election by bringing the action which was commenced before the second coverture—that is, when she was discovert—and that therefore the restraint arising on the second coverture might be disregarded. The learned judge rejected this argument also, and held that the obligation to elect arose when he delivered judgment. She was then a married woman restrained from anticipation, and therefore her income during the then existing coverture could not be applied in compensation. *In re Vardon's Trusts* (2) was cited, and was commented on in the judgment, but I do not understand from the report that there was any argument on the point of intention, or that it was considered by the learned judge.

(1) 27 Ch. D. 606. (2) 31 Ch. D. 275. (3) [1892] 1 Ch. 396.

If that case stood alone, I might be bound to adopt it to the extent of saying that the effect of the restraint on anticipation of Lady Lacon's interest having ceased, and she electing to take against the will—that is, electing to claim by inheritance the property which the testator purported to give her as bounty—she is bound to make compensation to those whom she defeats out of her interest in the residue. But, as already stated, I do not think that North J.'s decision covers the exact point, and if it must be treated as doing that by implication (for it certainly does not expressly), it is at variance with the principle upon which the decisions in *In re Wheatley* (1) and *In re Vardon's Trusts* (2) rest, and which principle seems to me to be perfectly sound.

There is, however, a subordinate point of which I find no trace in any of the other cases, but of which, after the arguments dealing with it, I am bound to take notice. It is said that the restraint on anticipation indicates only what Mr. Warrington styled a limited intention. It was argued in fact that, as the restraint can only operate during coverture, the testator must be taken to have intended that only during coverture it should interfere with election. This argument of course proceeds on the proposition that testators are supposed to know the law. So they are; but it does not follow that you must attribute to them knowledge of the refined doctrines of equity; and in my judgment it would be going much too far to say that when a testator restrains a woman from anticipation he must be taken to intend—although no doubt that is the result—that if at any time during her enjoyment she is discovert, the restraint will become wholly inoperative against her alienation. I put to counsel during the argument this test, which, on reflection, seems to me a good one. If the testator purported to restrain a man from alienation, his direction would be futile, because the law would not allow it; but could it be said that he did not intend such restraint to take effect? Intention, which depends on the construction of the testator's language, and the legal effect of that language are two different things.

(1) 27 Ch. D. 606. (2) 31 Ch. D. 275.

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I therefore hold that Lady Lacon is not bound to make compensation, even though she is now discovert and is capable of alienating her interest in the residue, because the restraint on anticipation is no longer operative.

Arriving at this conclusion, I need say nothing about Lady Thomas, who is still a married woman, but who it was said might become liable to make compensation if and when she became discovert.

Solicitors: *Hunters & Haynes; Fladgate & Co.*

H. B. H.

BYRNE J. 1900 *Dec.* 13.

In re MARTEN. SHAW *v.* MARTEN.

[1900 M. 2893.]

Will—Legacy—Gift by Appointment under a Power—Interest.

A testatrix, having under her marriage settlement a general power of appointment over a sum of 5000*l.* and certain funds comprised in the 1st schedule thereto, appointed that the trustees should stand possessed of the sum of 5000*l.*, and "of such portion of the stocks and securities comprised in the 1st schedule of the said indenture as shall, with the sum of 5000*l.* or the securities representing the same, make up the sum of 9000*l.*," in favour of certain appointees:—

Held, that the appointment was a specific gift of a portion of the stocks and securities, and that the appointees were entitled to the interest on the whole 9000*l.* from the death of the testatrix.

ADJOURNED SUMMONS.

The only question raised on this application which calls for any report was whether the income arising from a sum of 9000*l.*, mentioned in and appointed by the will of one Martha Marten under a power in her marriage settlement, belonged, during the first year, to the appointees from the date of her death, or was undisposed of and passed to her next of kin. The facts, so far as material, were as follows:—

By a settlement of October, 1880, made on the marriage of the said Martha Marten (then Martha Pilkington) with her

late husband Henry John Marten, certain securities specified in the 1st schedule thereto then of the value of about 6480*l.*, and a sum of 5000*l.* in money, were vested in, or paid to, the trustees of the settlement upon trust to invest and pay the income to the wife and husband for their respective lives, and then upon trust for the children of the marriage in the usual way, and in default of children (which happened) then, as to the securities specified in the said 1st schedule, in trust for such persons and for such purposes as the said Martha Pilkington should, during coverture by will or codicil, or, when not under coverture, by deed with or without power of revocation and new appointment, appoint, and in default of appointment, upon trust as to one sixth part thereof, if the said Martha Pilkington should survive her husband, for her, her executors, administrators and assigns; and as to the remaining five sixth parts thereof, for certain persons therein named absolutely; and as to the said sum of 5000*l.*, in trust for such persons, other than the husband, as the said Martha Pilkington should by will or codicil, or, when not under coverture, by deed, appoint, and in default of appointment, upon trust, if the said Martha Pilkington should survive her husband, for her, her executors, administrators and assigns.

Henry John Marten, the husband, died in November, 1892, and there were no children of the marriage.

Martha Marten by her will, dated March 1, 1893, after reciting her marriage settlement, and her desire of making appointments of the funds comprised in the said 1st schedule to the settlement and of the said sum of 5000*l.*, appointed that the trustees of the said settlement should stand possessed of "the said sum of 5000*l.* and the securities representing the same, and such part of the securities comprised in the 1st schedule of the said settlement as should with the sum of 5000*l.* make up the sum of 9000*l.*," in favour of certain named persons. The testatrix then proceeded to dispose of the residue of the stocks, funds, and securities in the 1st schedule in favour of other persons, and also purported to dispose of the residue of her real and personal estate, subject to the payment of her debts, in favour of her brother, and appointed executors.

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MARTEN, *In re.* SHAW *v.* MARTEN.

J. M. Stone, for the trustees.

Underhill, for the appointees. This is a specific gift of the 5000*l.* and of so much of the securities in the 1st schedule as are necessary to make up 9000*l.*; the income arising from these funds is therefore payable to the appointees from the date of the appointment, the death of the testatrix. *Dundas* v. *Wolfe Murray* (1) is in my favour. If this appointment had been made under a special power, there is no doubt that the income would have passed to the beneficiaries from the death of the appointor; the present appointment is equivalent to a direction to set apart specified funds for a particular object from the death of the testatrix; it is, therefore, a specific gift of a severed fund, and cannot be treated as a general legacy. *Tatham* v. *Drummond* (2) appears to be against this contention, and to be in conflict with *Dundas* v. *Wolfe Murray* (1), but in *Tatham* v. *Drummond* (2) the gift was in effect a general legacy.

[*In re Inman* (3) was also referred to.]

Levett, Q.C., and *John Chester*, for persons entitled in default of appointment. This is simply a legacy to come out of a particular fund; no interest is payable to the legatees until a year after the death of the testatrix; it is a gift of a definite sum—9000*l.*—with directions as to the method of raising it. The utmost the appointees can get is interest on the 5000*l.* from the death of the testatrix. In *Dundas* v. *Wolfe Murray* (1) the appointment was "immediately after the decease of the testatrix" to raise a sum, and an actual severance was directed by the will: that is not the case here.

Mulligan, Q.C., and *Manby*, and *Buckmaster*, representing residuary legatees or next of kin, adopted this argument, and relied on *Tatham* v. *Drummond*. (2)

Underhill, in reply.

BYRNE J., having read the appointment, continued:—The question is whether this appointment is wholly or partially specific. With reference to the 5000*l.*, I think it is quite clear

(1) (1863) 1 H. & M. 425. (2) (1864) 2 H. & M. 262.
(3) [1893] 3 Ch. 518.

that it is specific; what the testatrix takes and sets apart is the 5000*l.* and the stocks, funds, and securities representing the same. The rest of the appointment is a little more difficult, because the testatrix intends to take another property over which she has a power of appointment, but inasmuch as she makes a gift of "such part of the securities comprised in the 1st schedule as should with the sum of 5000*l.* make up the sum of 9000*l.*," I think that that gift is specific as well. I think the testatrix is specifically giving a portion of the stocks and securities in the 1st schedule; although it is true she leaves it to the trustees to decide which part of the whole specific fund shall be attributed to this purpose, yet in my opinion it is nevertheless specific. The result, therefore, is that the income of the 5000*l.* or the securities now representing the same, and of so much of the other securities as the trustees shall appropriate to make up the 9000*l.*, goes, from the date of the death of the testatrix, to the appointees.

Solicitors: *A. Toovey, for Bennett, Boycott, Orme & Goodman, Buxton; Ullithorne, Currey & Jennings, for Neve, Cresswell & Sparrow, Wolverhampton; J. & R. Gole, for Dixon & Syers, Liverpool.*

W. C. D.

BYRNE J.
1901
Jan. 18, 24.

KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS.

[1900 K. 502.]

Copyright—Infringement—"Printed or cause to be printed"—Copyright Act, 1842 (5 *& 6 Vict. c.* 45), *ss.* 15, 20, 21—*Dramatic Copyright Act*, 1833 (3 *& 4 Will.* 4, *c.* 15)—*Agent.*

Gavin being about to publish a work to be entitled "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for the year 1900," entered into an arrangement with Lloyds that the work should be published under their supervision and in conjunction with them, and that they should print it, they receiving 100*l.* a year for the use of their name and certain commissions. Lloyds instructed their agents abroad to assist in the bringing out of the work by giving such information as was required.

The work was proceeded with and Lloyds began the printing, but time being short Gavin, with the consent of Lloyds, caused a certain portion of the work to be printed by another printer. The work was ultimately published, and on the title-page appeared the words, "Printed at Lloyds', Royal Exchange, London."

The portion of the work not printed by Lloyds contained certain lists which, as proved at the trial, had been compiled by copying and printing the names and other particulars contained therein from the plaintiffs' Directory of Merchants, Manufacturers, and Shippers.

The question was whether Lloyds were responsible for the printing of the pirated portion, and ought to pay the costs. Gavin did not appear:—

Held, that there was no partnership between Gavin and Lloyds, that the printer of the pirated portion was not the agent of Lloyds, and that Lloyds had not "caused" the pirated portion of this work to be printed within the meaning of s. 15 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), consequently that the plaintiffs were not entitled to costs as against Lloyds, but that Lloyds, having allowed their name to appear as the printers, were not entitled to costs.

Russell v. *Briant*, (1849) 8 C. B. 836, and *Lyon* v. *Knowles*, (1863) 3 B. & S. 556, discussed, and the principles there enunciated followed.

ACTION to restrain the defendants, their managers, servants, printers, publishers, and agents, from printing, publishing, selling, delivering, or otherwise disposing of any copy or copies of a book or publication called "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for 1900," or causing or permitting any such copy or copies to be so printed, published,

sold, delivered, or otherwise disposed of, or from copying or pirating from any edition of the plaintiffs' directory called "Kelly's Directory of Merchants, Manufacturers, and Shippers," or any particular parts thereof, and from otherwise infringing the plaintiffs' copyright in their said directory.

The plaintiffs were the proprietors and publishers of a directory known as "Kelly's Directory of the Merchants, Manufacturers, and Shippers of the United Kingdom, and Guide to the Export and Import Shipping and Manufacturing Industries of the World," which directory contained a list of the names of the leading merchants, manufacturers, and shippers in the various town in Great Britain and Ireland and in the colonies, and in foreign countries. The names for insertion in the plaintiffs' directory were obtained by them by independent inquiries made through canvassers and other agents specially employed by them for the purpose. A new edition of the directory was brought out every year. The edition for 1899 was published in March, 1899.

The defendant Gavin had recently published a book entitled "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for the year 1900," which book was published under the supervision of and in conjunction with the defendant corporation known as Lloyds, and was, as stated in the title-page, "printed at Lloyds', Royal Exchange, London."

The book contained a list of colonial and foreign importers, and also of export commission agents, and the plaintiffs alleged by their statement of claim that that list had been compiled by copying and pirating the names and other particulars therein contained from the plaintiffs' Directory of Merchants, Manufacturers, and Shippers, which copying had taken place without their leave or licence, whereby the defendants had infringed the plaintiffs' copyright in their work.

At the trial it was proved to the satisfaction of the Court as against the defendant Gavin, who did not appear, and it was not disputed by the defendants, Lloyds, that as to a portion of the book there had been a clear case of copying and infringement of copyright, and the question as between the plaintiffs and Lloyds was whether Lloyds were responsible, under the

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circumstances hereinafter stated, for the pirated portion of the work.

The defendant Gavin, having determined to publish a Diary of Merchants, Shippers and Foreign Buyers, negotiated with Lloyds in order that the book might be published in connection with them, and an agreement, which was embodied in a letter from Gavin to Lloyds, was come to. The principal terms contained in the letter were as follows: "In reply to yours respecting the printing and publication of a work called 'Lloyds' Diary of Merchant Shippers,' I agree to the following terms. First, for the use of Lloyds' name, I will pay the committee a subsidy of 100*l.* a year, 5*l.* per cent. upon all moneys received from advertisements appearing in the diary, and 5*l.* per cent. upon all moneys which accrue to me for the sale of the publication. I will pay the committee for printing the diary 25*l.* per cent. above the actual cost of composition and machinery, the cost referred to not to be exorbitant or excessive." Clause 3 contained a guarantee by Gavin "that the total minimum profit to the committee from the printing, commission on advertisements, and sales and subsidy referred to shall not be less than 200*l.* per annum." The agreement provided that Lloyds were to be entitled to refuse the insertion of any advertisements which might be of an objectionable kind, but beyond this all matters relating to the form and character of the advertisements, reading matter, sale price of the work, &c., were to be decided by Gavin, who was to pay all expenses incidental to the production of the work, such as paper, binding, postage, &c., and the agreement was to continue for fourteen years, unless after two years it was found the work did not pay.

For the purposes of the preparation of the work Gavin wrote to the secretary of Lloyds as follows: "I inclose you a copy of the letter I would suggest your writing to the agents"—meaning Lloyds' agents abroad. That letter was as follows: "It is the intention of the committee to sanction the publication of a diary for 1900 intended to circulate amongst merchant shippers. The information which you have been good enough to supply in connection with the Shipping Diary has been, I

understand, greatly appreciated by shipping firms in this country, and I would deem it a favour if you would kindly supply me for the new diary with information in the enclosed form. In recognition of the trouble thrown upon you, I am informed that it is the intention of the publishers of the Merchant Shippers' Diary to give you an advertisement amongst the reading matter in connection with your diary, and also to forward you a complimentary copy of the work."

That document was manifolded, and as manifolded was signed on behalf of Lloyds, and was made use of for the purpose of obtaining from Lloyds' agents abroad the information required by Gavin for the purposes of his book. Gavin at the same time sent out certain lists which, as was clearly proved, were copied from the plaintiffs' book, and which were returned in due course.

It having become impossible for Lloyds to complete the printing of the work by the end of the year, it was arranged at Gavin's request that he was to be at liberty to get such portion of the book as could not be printed by Lloyds printed by other printers. This Gavin accordingly did, and the sheets so printed by those printers, which contained the pirated matter, and the sheets which had been printed by Lloyds, were sent to the binders. The title-page of the book when so bound having on it the words, "Printed at Lloyds', Royal Exchange, London."

The sole question was whether, under the circumstances above stated, Lloyds had rendered themselves liable under s. 15 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), which provides "that if any person . . . . shall print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as

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aforesaid, such offender shall be liable" as in the section mentioned.

It was not suggested that the Committee of Lloyds or any of their officials knew of the fraud which had been committed by Gavin, and it was admitted that when they became aware of it they did not sell any copies of the book.

Levett, K.C., and *Edward Ford*, for the plaintiffs. Lloyds had a distinct interest in the work, and they were parties to printing it. If it had not been for the assistance they gave Gavin he could not have obtained the information contained in the work. They did in fact "cause" the book to be printed within the meaning of the section, and we submit they must be held liable.

Scrutton and *F. D. MacKinnon*, for Lloyds. We submit that there is no evidence which will justify the Court in holding that Lloyds caused the work to be printed. There was no partnership between Lloyds and Gavin. The printers who printed the sheets containing the piratical matters were not in any sense Lloyds' agents. Gavin instructed them to print the sheets, and Lloyds had nothing to do with this part of the work. The case would have been different if Lloyds had printed the whole of the work.

There is no case in the books on this section of the Copyright Act as to the meaning to be put on the words "cause to be printed," but there are two cases under the Dramatic Copyright Act (3 & 4 Will. 4, c. 15), which Act was extended to musical compositions by ss. 20 and 21 of the Act now under consideration (5 & 6 Vict. c. 45), the facts of which cases bear a close resemblance to those here. Those cases are *Russell* v. *Briant* (1) and *Lyon* v. *Knowles*. (2) The words in the Dramatic Act are "represent or cause to be represented," and those cases decided that no person could be considered as an offender against the provisions of the Act so as to be liable to an action unless he by himself or his agent actually took part in the representation which was a violation of the copyright, and, therefore, that one who merely let a room to the offender

(1) 8 C. B. 836. (2) 3 B. & S. 556.

was not liable, even though he supplied the benches and lights and other necessaries. We submit that on the authority of those cases, which are analogous to the present case, Lloyds are not liable for the costs of this action.

Levett, K.C., in reply.

BYRNE J. His Lordship having stated the facts, proceeded as follows :—Now, it has very properly been admitted that Lloyds were not guilty of an offence under the second branch of this section, at any rate it has not been argued that they were. It is not suggested that they knew that the book had been unlawfully printed. The fraud committed was a fraud committed by Gavin, and it is not suggested that the Committee of Lloyds or any of their officials were aware of any such fraud ; and it is clear, if not conceded, that as to this portion of the work the printing was done by another firm of printers, and not by Lloyds. But it is said that, having regard to the agreement existing between Lloyds and Gavin, and to the fact that Lloyds had supplied the means of assisting Gavin to obtain the information required for the book through their agents abroad, it ought to be held that they have within the meaning of the Act caused this pirated portion of the book to be printed.

There are, as far as I know, no cases decided under this particular section, but there are authorities that have been decided under a section having somewhat similar words in another Act, and the first case that was cited to me was that of *Russell* v. *Briant*. (1) The Act in question there was the Dramatic Copyright Act (3 & 4 Will. 4, c. 15), which was extended to musical compositions by the 20th and 21st sections of 5 & 6 Vict. c. 45, and the words used in the Act of 3 & 4 Will. 4 are words imposing a penalty upon any person who shall represent or cause to be represented a dramatic piece without the consent in writing of the proprietor. I change the words "represent" and "represented" for the words we have here—"print" and "printed"—and the words so far are exactly alike.

What happened in that case was this. There had been a

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letting by the proprietor of a certain tavern of a place where dramatic entertainments could be performed, and where the person taking it from him performed a piece called "The Ship on Fire." He was the only performer in the piece, and the room was hired for several nights by one Smith for the purpose of giving public vocal and musical entertainments. He paid the defendant so much a night. The further proceedings that the landlord of the tavern took with reference to the matter were that he furnished the platform, benches, and lights, and allowed placards describing the intended performance to be stuck up in and about the tavern, the bills or programmes of the entertainment were circulated by him, and tickets or cards of admission sold by him and also by his servant at the bar of the tavern, one ticket being sold by the defendant himself. The Court came to the conclusion that the evidence was not sufficient for them to say that the defendant had caused the piece to be represented within the meaning of the Act, and in the course of his judgment Wilde C.J. said (1): "We are of opinion that there was no such evidence, and that therefore the rule must be made absolute for entering a nonsuit." After stating the facts he says: "We think, having regard to the object of the Act, and the language of the 2nd section, that no one can be considered as an offender against the provisions of it, so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright. And, if it were to be held, that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the Act, such a doctrine would, we think, embrace a class of persons not at all intended by the Legislature."

The second case referred to was that of *Lyon* v. *Knowles*. (2) In that case the proprietor of a theatre had entered into a certain arrangement with one Dillon. Under that arrangement Dillon provided the company, selected the pieces, had the management of the representation, and had exclusive control

(1) 8 C. B. 847, 848. (2) 3 B. & S. 556.

over the persons employed at the theatre. The defendant on his part paid for printing and advertising, furnished the light, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the doors was taken by servants of the defendant, who retained one-half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to Dillon. In that case the Court came to the conclusion that, inasmuch as there was no partnership between the proprietor of the theatre and Dillon, there was no liability by reason of the agreement to share in the gross takings, or by reason of the agreement the landlord had entered into with Dillon as to what he should provide, to constitute that a causing of the representation by him.

Now of course these are only illustrations of what may be considered as "causing" a representation within the meaning of that particular Act, but they do help to this extent—that in reference to representations, the Court came to the conclusion that the act complained of must be "caused" by the person himself or his agent.

What I have to do here is to see whether, the whole of the order for printing the matter complained of having been given by Gavin with the sanction of Lloyds, I can fairly regard the printer who actually did the work as being an agent of Lloyds for the purpose of printing this book.

First of all, there was no partnership between Gavin and Lloyds. It is true there was an agreement between them for the printing and publication of a certain work, and that Lloyds were to receive profits by reason of the publication of the work, and it is also true that they were to allow the use of their name as a sort of authority for the book—that is, they allowed it to be stated that it was published under their supervision, and they were content to allow it to go forth to the world with the title-page stating that it was printed at Lloyds', Royal Exchange, London. I have said no partnership was constituted by the agreement, and I do not think, having given it careful consideration, that I should be justified in holding that the printing by the third party, who was not a party to the

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agreement, but who printed on the orders of Gavin and was paid by him, was something done by an agent of Lloyds.

I need hardly say that Lloyds, on their attention being called to the piracy, repudiated all knowledge of the fact and of any intention to print and publish a book containing a piracy; but, on the other hand, I do think that by allowing their name to appear on the title-page, and it being only by a happy accident that they have not made themselves liable as the actual printers of the book, I ought not to give them any costs of this action.

The plaintiffs are entitled to an injunction against Gavin with costs, but are not entitled to costs as against Lloyds.

Solicitors: *Scott, Spalding & Bell; Waltons, Johnson, Bubb & Whatton.*

G. M.

COZENS-HARDY J.
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Dec. 6.

In re PLAYER & SONS' TRADE-MARK, No. 225,035.

Patents, Designs, and Trade Marks Acts, 1883–1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *s.* 62—*Double Registration — Non-essential Particulars — Disclaimer—Time.*

Registration will not be allowed of a trade-mark identical in essential particulars with, but differing in non-essential particulars from, a registered mark of the applicant himself.

The exclusive use of non-essential particulars on a trade-mark must be disclaimed in the application for registration. Subsequent amendment will not be allowed.

THIS was the hearing of an appeal referred to the Chancery Division of the High Court by the Board of Trade against a refusal by the Comptroller of Trade Marks to register a trade-mark (numbered 225,035) on an application by John Player & Sons, Limited, in class 45, for manufactured tobacco.

The trade-mark consisted of the head of a sailor, with the sea and a full-rigged ship and a turret ship in the background, surrounded by a life-belt: on the belt was the legend "Player's Navy Mixture." The applicants disclaimed the exclusive use of the words "Navy Mixture." The cap of the sailor had the

word "Hero" on it. The applicants alleged that the trade-mark was identical with a trade-mark of theirs, No. 154,011, already on the register, in essential particulars, differing only in legend on the life-belt, which consisted of the words "Player's Navy Cut" instead of "Player's Navy Mixture." The engraving of the sailor's head and the ships on the proposed mark was more distinct, and gave the impression of a younger man than the engraving on the mark already registered. One objection to registration taken by the comptroller was that the proposed mark was a new design, including the head of a young sailor as a prominent feature, and therefore likely to be confused with other marks on the register. Another objection was that the applicants had already used it on cigarette boxes with the word "registered," and, therefore, if it was a new mark, had precluded themselves from registration. A third objection was that the applicants, although in registering mark 154,011 they had disclaimed the exclusive use of the word "Hero," had not in their present application done so. They now offered to disclaim. If the marks were the same in essentials the comptroller objected to a second registration. There was evidence on the part of the applicants that in order to obtain protection in some foreign countries, in accordance with existing conventions, for the use of their mark with the legend "Player's Navy Mixture" it was necessary to get the mark registered in England with that legend on it in the way it was desired to use it abroad. Another objection taken by the comptroller to registration was that the expression "Navy Mixture" was deceptive, in that it implied that the article to which the trade-mark was attached was used by or had some official sanction in connection with the Royal Navy.

John Cutler, Q.C., and *Sebastian*, for the applicants. Some of the objections to registration on the part of the comptroller depended on the essential part of the mark—namely, the sailor's head and ships—being different from the mark already on the register with different non-essential words. Our view is that for business purposes the designs are the same. Then, if that be the true view, it is said that double registration is improper.

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The Legislature allows registration of the same design in devices with different matter added, and a second registration in a case like this has been allowed: *In re Fox & Co.* (1) The object of the second registration is to enable the applicants to obtain protection abroad; it would be contrary to public policy to fetter British trade by preventing double registration.

We ask that the applicants should be now allowed to disclaim the exclusive use of the word "Hero." The Court will not put the applicants to the unnecessary expense of making a fresh application to cure a technical want of formality: *In re Swift Specific Company's Trade-mark.* (2)

Sir R. B. Finlay, A.G., and *R. J. Parker*, for the comptroller. The design now sought to be registered is really a different design from the one they have registered: the sailor is a different sailor, a young sailor instead of an old one, and is so near other registered marks that the comptroller was justified in refusing registration; furthermore, the applicants have used the design with the word "registered"; if it be a new design, by such user they have precluded themselves from registering: *In re Fuente's Trade-mark.* (3)

Assuming that the designs are the same, the applicants could not register without disclaiming the exclusive use of the word "Hero," and that had to be done with the application; it is now too late to disclaim: *In re Apollinaris Company's Trade-mark.* (4)

If this technical objection could be got over, it would not be right to incumber the register with the useless second registration of what is already there: *Baker* v. *Rawson.* (5)

John Cutler, Q.C., in reply.

COZENS-HARDY J. I think this application fails in point of form and in point of substance.

The application which the comptroller has declined to proceed with is one asking for the registration of a mark the essential particulars of which are stated to be "The following

(1) (1881) Sebastian on Trade Marks (4th ed.) 337.
(2) (1889) 6 Rep. Pat. Cas. 352.
(3) [1891] 2 Ch. 166.
(4) [1891] 2 Ch. 186.
(5) (1890) 45 Ch. D. 519, 530.

combination of devices and the word 'Hero,'" the applicant disclaiming any right to the use of the added matter, except so far as it consists of the use of their own name. It is now alleged by the comptroller, and it is admitted by the appellants, that they themselves had disclaimed the word "Hero" as being an essential part of the mark, and that it may not now be properly regarded as being an essential part of the mark. I think, according to the decision of Chitty J. in *In re Meeus' Application* (1) and Kekewich J. in *In re Apollinaris Company's Trade-mark* (2), that it is too late now for me to allow an amendment of the application, and on that ground I think this application might be disposed of; but I prefer not to deal with it on that ground alone.

Supposing that difficulty got over, the matter, putting it most favourably for the applicants, would stand thus. They apply to register a mark 225,035, which is identical in all the essentials of the mark with No. 154,011. I say that, assuming in their favour that the representation of the sailor, though in some respects very unlike the other, is really, for business purposes, the same sailor. When No. 154,011 was applied for, the application was accompanied with this: "Applicants will in use vary the use of the word 'Navy Cut' by substituting therefor the names of other articles included in the specification of goods." They did not claim "Navy Cut" as essential to the trade-mark. They disclaimed any right to that, and at the same time they said that they would in the use of their mark reserve the right to substitute the names of other articles included in the specification of goods. It is, therefore, I think, perfectly clear that the existing registration No. 154,011 covers, and absolutely covers, this which they now desire should be registered, namely, "Player's Navy Mixture," disclaiming, as they must do, the words "Navy Mixture," and also the word "Hero." That being so, if they have got an existing registration, absolutely and entirely protecting in this country what they want to register, why should they register anything more? I think the very point was decided by North J.

(1) [1891] 1 Ch. 41. (2) [1891] 2 Ch. 186.

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in *Baker* v. *Rawson* (1), where he says: "The defendants have had their trade-mark, the winged cross, on the register from the year 1877 down to the present time, and they are now asking to register that mark again, plus the circles, minus the same. They ask that their well-known trade-mark may be registered with the addition of the circles, accompanied by a note that the circles are not part of the trade-mark. That application seems to me an absurd one." This application put in that way seems to me also to be an absurd one. I think I ought not to allow the mark for which application is made to be put on the register. The registration is absolutely superfluous, so far as English law is concerned, and it would, I think, cumber the register needlessly, simply on the suggestion that it may be a convenience in some foreign countries, with a view to some other proceedings, to have a duplicate registration of their mark.

In the view which I take, it is not necessary for me to say a word about "Navy Mixture," or about the use on the cigarette boxes of what in substance is the new mark with the statement that it is registered. I do not base my judgment on those points at all, though I think they would both be worthy of consideration should necessity arise.

This application must be dismissed with costs.

Solicitors: *Urquhart Fisher; Solicitor to the Board of Trade.*

(1) 45 Ch. D. 519, 530.

D. P.

COOK *v.* CONSERVATORS OF MITCHAM COMMON.

FARWELL J.

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Nov. 15, 16, 17, 20.

[1900 C. 963.]

Common—Scheme for Regulation under Metropolitan Commons Acts—Limits of Common as defined by Scheme—Binding effect of Scheme—Metropolitan Commons Acts, 1866 (29 & 30 *Vict. c.* 122); 1869 (32 & 33 *Vict. c.* 107), *and Metropolitan Commons (Mitcham) Supplemental Act*, 1891 (54 & 55 *Vict. c. xxvi.*).

Where a scheme for the regulation of a common has been framed and confirmed under the Metropolitan Commons Act, 1866, it is conclusive as to the limits and extent of the common. The owner of any land which is included in the plan embodied in the scheme cannot, after the passing of the Act confirming the scheme, successfully assert his title thereto.

TRIAL OF ACTION.

The plaintiff claimed to be the owner in fee of a small portion of Mitcham Common, and he brought this action against the defendants to establish his title thereto.

The defendants were constituted conservators of Mitcham Common by a scheme framed under the Metropolitan Commons Acts, 1866 and 1869. This scheme was dated December 30, 1890, and was confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891. According to a plan which was embodied in the scheme, the piece of land in question was included in and formed part of the common as delineated in the plan and thereon coloured green.

Prior to the passing of the Act of 1891, what was known as Mitcham Common formed part of the undivided wastes of the four manors of Mitcham, Vauxhall, Biggin and Tamworth, and Ravensbury. The limits of these separate wastes had never been defined.

The plaintiff derived his title under a copyhold grant, dated in 1855, from the lord of the manor of Biggin and Tamworth, with the consent of the homage, and under a subsequent deed of enfranchisement enlarging the copyhold estate into a freehold. The piece of land had been subject to various dealings since 1855, but was ultimately conveyed to the plaintiff in fee by a deed dated November 4, 1899. The plaintiff alleged that

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the inclusion of the land in the common as defined by the scheme was wrongful, and that the defendants had erected notice boards thereon in derogation of his rights. He claimed (1.) a declaration that the piece of land, although ostensibly comprised in and subject to the scheme, was not in fact so comprised in or subject thereto; and (2.) an injunction to restrain the defendants from continuing the notice boards upon the plaintiff's land.

The defendants disputed the plaintiff's title on the ground (1.) that the land could not be identified as part of the waste of the manor of Biggin and Tamworth, and (2.) that, even if it were proved to be part of that waste, the grant of 1855 was not sufficient to exclude the rights of the lords of the other manors and other persons who had rights over the whole common. But they further contended, and the case was dealt with by the Court upon this point alone, that the plaintiff's rights, if any, were entirely overridden by the scheme and the Act confirming the same.

The material provisions of the Act of 1866 and of the scheme will be found sufficiently stated in his Lordship's judgment.

Upjohn, Q.C., and *A. Brown*, for the plaintiff.

Butcher, Q.C., and *Austen-Cartmell*, for the defendants. Under the scheme it is clear that this land forms part of the common. The scheme has the force of an Act of Parliament. It is conclusive, and overrides the plaintiff's rights if he ever had any. He asks the Court to hold that the land is outside the scheme altogether. If his rights have been affected by the scheme he is entitled to compensation under clauses 37 and 40 of the scheme. Clause 37 is founded upon and must be read with s. 15 of the Act of 1866. It is said that s. 15 of the Act is limited by s. 14; but those sections are totally independent, and s. 15 is absolutely general in its terms. Throughout the Act of 1866 the Legislature has been careful to protect private rights, and to ensure that the utmost publicity shall attend the framing and confirmation of a scheme. The result of that is shewn in this very scheme, because the rights of certain

persons who claimed estates of freehold are reserved to them by clauses 38 and 39. The Act is for the benefit of the public, and no scheme could ever be effective if the conservators were to be obliged to contest the title to every piece of land comprised therein. After the scheme has been confirmed it is too late for any one to contend that land which is included therein does not form part of the common. The terms of the Act are express. The Court is in effect asked to restrain the conservators by injunction from doing what they are directed by the Act to do, namely, to preserve the common from trespass and encroachment.

The case is really covered by the decision of Chitty J. in *Chislehurst Common Conservators* v. *Newton* (1), where he held

(1) Chitty J. July 15, 1887.

CONSERVATORS OF CHISLEHURST COMMON *v.* NEWTON.

IN this action the plaintiffs claimed an injunction to restrain the defendant from erecting any wall or building upon any part of the common subject to their jurisdiction.

The plaintiffs were appointed conservators of Chislehurst Common by a scheme made under the Metropolitan Commons Acts of 1866 and 1869. The defendant alleged that he was the owner of a piece of land forming part of the common as defined by the scheme. The plaintiffs alleged that the defendant had purchased the piece of land in question with notice of the scheme and the Act by which it was confirmed, but that he had notwithstanding commenced to build a wall for the purpose of inclosing the land. They consequently brought this action, and now moved for an interim injunction.

Romer, *Q.C.*, and *Kenyon Parker*, for the plaintiffs.

Sir A. Watson, *Q.C.*, and *Chadwyck Healey*, for the defendant, contended that the plan embodied in the scheme was surplusage and not of the essence of the confirming Act.

['They referred to *Dendy* v. *Simpson*, (1856) 18 C. B. 831, *Howard* v. *Earl of Shrewsbury*, (1874) L. R. 17 Eq. 378, and to the Metropolitan Commons Acts, 1866 and 1869.]

CHITTY J. The plaintiffs, the conservators, complain of a wrongful (as they say) encroachment upon a part of the Chislehurst Common, which is placed under their care by virtue of an Act of Parliament; and the defendant, who admits in point of fact that he has done what he is alleged to have done, says that the ground on which he has placed the encroachment is his own private property. To that the conservators say that, according to the terms of the Act of Parliament, this property is included within the area of the common of which they are conservators.

The question turns upon the Act of 1886, which is "An Act to confirm a Scheme under the Metropolitan Commons Act, 1866, and the Metropolitan Commons Amendment Act, 1869, relating to Chislehurst Common." The Act contained the usual recitals: first, that the Land Commissioners for

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that a scheme almost identical with the present one was conclusive as to what was included therein.

England have under these Acts duly certified a scheme for the establishment of local management with respect to Chislehurst Common; that the scheme is set forth in full in the report made by the commissioners of December 31 previously; and that it had been duly laid before the Houses of Parliament. The Act itself which I am reading was passed on June 4, 1886. Then the Act recites that by the Metropolitan Commons Act, 1866, it is provided "that any scheme shall not of itself have any operation, but shall have full operation when and as confirmed by Act of Parliament, with such modifications, if any, as to Parliament seem fit." Then there is the usual recital that it is expedient that the scheme should be confirmed, subject to certain modifications; and the 1st section is to this effect: that the scheme for the establishment of local management with respect to this common shall be modified "so as to be in the terms specified in the schedule to this Act, and so modified shall be hereby confirmed."

Now the 1st clause of the scheme in the schedule is in these words: "The pieces of land, with the ponds thereon, commonly called or known by the names of Chislehurst Common and Scadbury Common, and including Place Green and Shepherd's Green (hereinafter called the commons), situate in the parish of Chislehurst, in the county of Kent, as the same are delineated in a plan deposited with the Land Commissioners for England, shall henceforth, for all the purposes of this scheme, be regulated and managed by a body of conservators." The next important section to read in connection with this section, which is one as to the area of this common, is the 15th, which runs thus: [His Lordship read the section, which was in terms almost identical with those of s. 17 of the Mitcham Common scheme, and continued:—] Now, it was made a question at the commencement of the defendant's argument whether the plan did shew that the piece of ground in question was intended, according to the plan, to be included in the commons. [His Lordship then dealt with that question and examined the plan referred to in the scheme, and came to the conclusion that the piece of ground in question was intended by the place to be included in the commons. He then continued:—]

Then comes the question, which has been argued at considerable length, as to the construction of the Act of Parliament. It is said that the scheme ought to be read in this way: that only those lands which, first, were commonly known as part of the common; and secondly, which were to be found situate in the parish of Chislehurst, in the county of Kent; and thirdly, are delineated in the plan —that those lands and those only are within the scheme. In other words, in order to be within the scheme, the lands must fulfil all those three qualifications.

The force of the argument on this point for the defendant consisted in the consideration of the circumstances I am about to state. It was said, and said truly, that the commissioners have no power to determine as between adverse claimants what is, and what is not, part of the common that is proposed to be dealt with under those Acts of Parliament, and conse-

[They also referred to *Bradford Corporation* v. *Pickles*. (1)]

Upjohn, Q.C., in reply. Upon the true construction of the Act and scheme the plaintiff's title is not affected thereby. In

quently it must be presumed that they would not attempt in the scheme to deal with anything that was not part of the common; and, therefore, that in construing this Act of Parliament I must bear that in mind, and hold that the Legislature did not intend to include anything in the scheme which was not shewn to be, and could not on a controversy arising be shewn to be, part of the common, taking the term common in the usual sense of that word, that is, part of the waste of the manor. Those are no doubt considerations of considerable importance. But then on the other hand there is this—and these considerations appear to me of even greater importance. The object of these Acts of Parliament is to establish a scheme of local management with respect to the common; and the schemes (of which this is only an illustration) are full of provisions of a more or less minute character with regard to the regulation of the area which is included in the scheme; and it would be at least a very unwise thing to do—to appoint a body of conservators with all these powers conferred upon them and conferred upon the police with reference to this area, and not to tell them what the area is. Just by way of illustration I mention one of the provisions upon which my eye happens to rest now: "Any constable or any officer of the conservators . . . . may without any other warrant than this scheme, seize and detain any person offending or having offended against any by-law of the conservators." The by-laws of the conservators then made are contained amongst others in the 19th section; and amongst other things the regulation of games to be played, the prevention of bird-catching, and setting traps and various matters of that class are dealt with—squatters, gipsies, and so forth; and the result would be, that if the defendant is right, and this is his own private property, as he says it is, the policeman who detained him or any person or stranger on that ground who was offending against one of the by-laws would be told first that he was a trespasser in coming on there at all, and, secondly, that the scheme did not give him any warrant to seize. There would be infinite confusion in the execution of the powers conferred upon the conservators if that were the result of the Act of Parliament; because they might be called upon, according to this view, to contest every square inch of ground throughout the space which is delineated upon the plan. These are merely considerations upon which I approach the exact question I have to decide. I think that the right way to decide on Acts of Parliament is to take the grammatical meaning, unless there is something in the context or in the nature of the provisions which is sufficient to displace the ordinary rule. Now here the 15th clause appears to me to be of the highest importance: "The conservators shall maintain the commons as delineated in the plan." I think there the

(1) [1895] A. C. 587.

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Chislehurst Common Conservators v. *Newton* (1) the saving clause was subject to the rest of the scheme and differed altogether from the present one. It excluded a fasciculus of clauses 14–19. The saving clause there was almost a nullity. Here clause 37 is express and without exception, and the plaintiff is protected by it. There is no provision for compensation in the case of a person who is entitled to the fee simple of land which has been per incuriam included in the scheme. If the saving clause be construed strictly it operates in favour of the plaintiff.

FARWELL J. I shall assume for the purpose of my decision that the plaintiff has proved his title to the fee, starting with the grant by the lord of the manor of part of the waste in March, 1855. I assume it, without deciding it in any way. Then I have to determine, on the provisions of the Act of Parliament, the scheme, and the Act confirming the scheme, what the rights of the parties are. The general Act of 1866 defines "common" to mean "land subject at the passing of this Act to any right of common." It then proceeds to enact that the commissioners shall not entertain an application for the inclosure of a metropolitan common or any part thereof, the object being to preserve for the public at large open spaces in the neighbourhood of the metropolis. Sect. 6 provides for the establishment of a scheme of local management, "with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of by-laws and regulations," and so on. For

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Legislature intended that the plan should govern it—that the plan is that to which the conservators who are to maintain the commons are to have regard. That is the area that is entrusted by this Act of Parliament to their conservation. I do not agree with the argument on the part of the defendant that the words in the 1st section, "as the same are delineated," are merely words of additional description. I think those words were intended to throw the Court that might have to construe this clause upon the plan as the guiding instrument. That being my opinion, for these reasons, which I have given shortly, I think the plaintiffs are entitled to the order.

Solicitors: *Horne & Birkett; Stibbard, Gibson & Co.*

(1) See n. (1), ante, p. 389.

that purpose Parliament enacted a number of sections, 7–13, all of which provide for the greatest possible publicity in the settlement of the scheme, and in the consideration of its contents before it is finally adopted. It is to be printed and published, objections or suggestions are to be received for two months after the first publication, the commissioners are authorized to send an assistant commissioner to hold an inquiry, and he is empowered to receive any evidence or information offered, and to hear and inquire into any objections or suggestions made or to be made during the sitting or sittings respecting the scheme or the common, with power to adjourn. Then there is to be a report made by the assistant commissioner to the commissioners. Section 13 provides: "After the expiration of the said two months, or the receipt by the commissioners of the report of the assistant commissioner (as the case may be), the commissioners shall proceed to consider any objections or suggestions made to them in writing respecting the scheme, and the report (if any), and thereupon they shall, if they think fit, finally settle and approve of the scheme in such form as they think expedient." The Act further provides by s. 14 that the scheme is to "state what rights (if any) claimed by any person or class of persons are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person or class of persons, or any of them." I pause there to observe that to my mind that is an exceedingly comprehensive enactment, and refers to all rights—that is to say, not merely rights in and over the common as such, but the right to claim that a portion of the land said to be common is not so, but belongs in fee simple to another person. Down to this point it will be observed that every step is taken under the direction of the Legislature for the fullest publicity and the fullest possible inquiry. It is of course essential to the success of a scheme of this nature that the limits of the property affected by the scheme should be once for all settled. Then section 15 is a provision for compensation, which I will read later on with reference to a clause in the scheme. Then s. 16 provides: "If

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any person claiming any estate, interest, or right in, over, or affecting the common to which any scheme relates is dissatisfied with any determination made or implied by the commissioners or by the scheme concerning any estate, interest, or right in, over, or affecting the common, every such person may obtain a decision thereon in an action at law in the manner provided by s. 56 of the general Act to facilitate the inclosure and improvement of commons, passed in the session of the 8th and 9th years of Her present Majesty, chapter 118." The next provision is that the scheme is to be printed. Then it is to be verified by the commissioners, sealed with their common seal and published, and it is to be comprised in a report laid before Parliament; it is to be laid before both Houses within fourteen days after the making thereof if Parliament is then sitting, and if not then within fourteen days after the next meeting of Parliament. The scheme down to this point has no operation at all, but s. 22 provides that it "shall have full operation when and as confirmed by Act of Parliament, with such modifications (if any) as to Parliament seem fit." Under that Act the scheme in question was approved by the Board of Agriculture on December 31, 1890; and, having compared it with the scheme before Chitty J., I find that it is practically a common form with provisions adapted to the circumstances of each particular case. Clause 1 enacts as follows—and I should mention that, inasmuch as it has been confirmed by the Act, it is of statutory validity, and I am in fact now reading an Act of Parliament—"The pieces of land, with the ponds and roads thereon, commonly called or known by the names of Mitcham Common, Upper Green, Lower Green, Figgs Marsh, and Beddington Corner (hereinafter referred to as the commons)"—that is to say "the commons" in this Act means those four commons I have mentioned—"situate in the parish of," and so on, "as the same are delineated in a plan deposited with the Board of Agriculture and thereon coloured green, shall henceforth for all the purposes of this scheme be regulated and managed by a body of conservators." That is a clear statement of the extent and limit of the land affected by the scheme, and, as Chitty J. pointed out in the judgment which has been

read to me, it is a provision which is most material for the proper working of the scheme. The next clause to which I need refer is the 17th. It says: "The conservators (subject to the provisions of clause 39 of this scheme) shall maintain the commons as delineated in the plan deposited with the Board of Agriculture free of all encroachment, and shall not permit any trespass on or partial or other inclosure of any part thereof," and so on. That is a positive enactment directing the conservators to do that which I am asked to restrain them by injunction from doing, namely, to retain the commons as delineated in the plan free from all encroachment, and not to permit any trespass or inclosure thereon. Clause 18 enables the conservators to set apart portions of the commons for games; clause 19 to make by-laws for the prevention of encroachments and so on. And then clause 37 is a saving clause, on which counsel for the plaintiff relies. It is in general terms, and is followed by two special clauses shewing the reservation of other rights in special terms. Clause 37 is in these words: "Saving always to all persons and bodies politic and corporate, and their respective heirs, successors, executors, and administrators, all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the common or any part thereof as they or any of them had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed by Act of Parliament." Referring back to s. 15 of the Act of 1866, which I did not read when I was referring to that Act, it is plain that clause 37 is founded on s. 15. The words are almost identical. Sect. 15 provides that: "No estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation being made." Clause 37, to my mind, refers to rights of a profitable or beneficial nature in, over, or affecting the common. It is not intended to be a reservation of any right such as arises in the present case, namely, a right to deny that any given piece of land is within the limits of the common as defined by the Act of Parliament. The Act of

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Parliament has said in terms what the limits of the common dealt with by the scheme shall be, and it has in terms expressly provided that the conservators shall keep it free from encroachment. To my mind clause 37 only refers to rights over the common as defined by the Act, and that construction is confirmed by the provisions of clauses 38 and 39 which deal expressly with claims made, not only by the lords of the manors, which, of course, are claims to the soil of that particular common, but also the claims of persons who allege that certain pieces of land are their own freehold property, and not subject to rights of common at all. That is a matter which it was open to the commissioners to consider, and which they were bound to state under s. 14 of the Act of 1866 if any such right was claimed. In accordance with that provision in clauses 38 and 39, they do state what rights were claimed contrary to the general scheme as to the extent and limits of the commons affected. As regards those, it was open to persons raising them either to bring an action under s. 16 of the Act of 1866, or to do what I infer they did by reference to clause 42 of the scheme, namely, settle with the commissioners on terms, or to leave it open for Parliament, when the matter came before the House, to deal with either by way of express provision, or by passing over sub silentio and disregarding the claims of the persons so stated. The contention really comes to this—that although I find an express statement in the scheme that these particular rights of persons who do make claims are reserved for them in a special manner in accordance with the terms of the Act, it was wholly unnecessary, because it was already provided for by clause 37 of the scheme; and it is contended that I am also to hold that a person who lies by and takes no step at all, and does not take advantage of these provisions of the Act to which I have referred giving publicity to the scheme, is to be in a better position than persons who are alive to their interests and do take the necessary steps; and that nine years after the scheme has received statutory confirmation, it is open to a person who only last year bought a piece of land included in the common to come in now and raise a claim such as the plaintiff raises in the present case. To my mind, on the con-

struction of this Act, no injustice is done at all. If any claims are raised to rights limiting the extent of the common they are provided for by the Act of Parliament, and have to be brought before the commissioners, and have to be stated in the scheme expressly under s. 14. If any person chooses to lie by disregarding the notices and the advertisements, and takes no heed of what is going on close to his very door, it appears to me that the maxim "Vigilantibus non dormientibus jura subveniunt" applies, and that the Act was passed on that footing. I have in this case the assistance of the decision of Chitty L.J. (when Chitty J.) on an Act and a scheme which are, with one exception, on all fours with this Act and scheme. Clause 15 in the Chislehurst case is in the same terms as clause 17 here, except that clause 17 in the present case is made expressly subject to the provisions of clause 39; but this was necessary, and accords with the view that I take, because the claims under clause 39 were claims to freehold land alleged not to be within the limits of the common at all, and not to rights in and over the common. It is also argued that clause 37, the saving clause here, contains no exception, whereas the saving clause in the Chislehurst scheme is made subject to clauses 14–19 of the scheme, but that to my mind is a distinction without a difference; the saving clause is intended to reserve rights in the nature of a profit à prendre, and clause 17 does not in any way prevent the exercise of any such rights; but even if that were not so, the very fact that clause 17 here is expressly subjected to clause 39 is clear evidence to shew that the saving clause 37 does not apply to clause 17 at all. Therefore I have the same reason as Chitty J. had to guide me in deciding this case.

On those grounds, in my opinion, the plaintiff's case fails, and the action must be dismissed with costs.

Solicitors: *Ward, Perks & McKay, for Streeter & Howe, Croydon; Edridge & Newnham.*

G. A. S.

FARWELL J.

1900

Dec. 7, 8.

In re DOWSETT.
DOWSETT *v.* MEAKIN.

[1900 D. 998.]

Will—Ademption—Special Testamentary Power of Appointment—Exercise of Power—Subsequent Compulsory Sale of Property subject to Power—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 23.

For the purposes of the question whether an appointment under a testamentary power has been adeemed by subsequent dealings with the appointed property, no distinction is to be drawn between general and special powers.

Gale v. *Gale*, (1856) 21 Beav. 349; *Blake* v. *Blake*, (1880) 15 Ch. D. 481; *Collinson* v. *Collinson*, (1857) 24 Beav. 269, and *In re Johnstone's Settlement*, (1880) 14 Ch. D. 162, considered and explained.

ADJOURNED SUMMONS.

The testator, John Dowsett, who died in November, 1873, by his will, dated July 10, 1869, devised three freehold houses —149, 151, and 153, Cable Street, in the parish of St. George-in-the-East, Middlesex—to trustees upon trust to pay one-third of the rents and profits thereof to his daughter Maria Dowsett during her life, and after her death upon trust to pay the same to her children as therein directed in equal shares; and in case she should die without leaving any child who should acquire a vested interest in her share, then the testator devised the same to such one or more of her brothers or sisters, nephews or nieces, as she should by will or codicil thereto direct or appoint; and in default of any such appointment the testator directed that the said share should fall into his residuary estate.

Maria Dowsett by her will, dated March 8, 1880, in exercise of the power given to her by the will of her father John Dowsett, appointed her one-third share in the houses, Nos. 149 and 151, Cable Street, to her sister Mary Anne Wilkinson for her life, and after her death she appointed the same to her nephew E. E. Meakin in fee simple, but subject to and charged with a payment to her niece Theodora Meakin of an annuity of 10*l.* so long as she should remain unmarried. But in case the said E. E. Meakin should die before the said

Theodora Meakin without leaving issue him surviving, then the testatrix gave and devised the said one-third share in the two houses to her niece the said Theodora Meakin absolutely. The testatrix further appointed her one-third share in the house 153, Cable Street, to her sister Emma Jane Gibbons for her life, and after her death to her nephew W. Meakin in fee; but in case the said W. Meakin should predecease his cousin J. W. Dodsworth without leaving issue him surviving, then the testatrix appointed the said third share to the said J. W. Dodsworth absolutely.

In 1891 the houses in question were taken by the London and Blackwall Railway Company under their compulsory powers, and the purchase-money (5600*l.*) was paid into court under the provisions of the Lands Clauses Act, 1845, and invested in pursuance of orders made from time to time by the Court in the purchase of certain freehold ground rents, which were conveyed to the trustees of the will of John Dowsett upon the trusts contained in his will relating to the said houses 149, 151, and 153, Cable Street.

In 1893 Maria Dowsett became plaintiff in a partition action in respect of the said ground rents, and on March 11, 1893, an order for partition was made therein by Stirling J. The chief clerk's certificate was filed in the action on January 25, 1894, and thereby certain of the ground rents were particularly specified as representing Maria Dowsett's original one-third share in the Cable Street houses.

By an indenture dated January 26, 1894, the trustees of John Dowsett's will declared, in pursuance of the judgment in the said action, that they would thenceforth hold the ground rents so specified in the chief clerk's certificate upon the trusts contained in the testator's will concerning the one-third share of Maria Dowsett in the Cable Street houses.

Maria Dowsett died on December 21, 1899, without leaving any issue and without having altered or revoked her will, which was proved on January 17, 1900.

This was a summons raising the question whether the appointment contained in the will of Maria Dowsett took effect to any and what extent having regard to the subsequent dealings

FARWELL J.

1900

DOWSETT, *In re.* DOWSETT v. MEAKIN.

with the property; or whether the ground rents representing the original one-third share of Maria Dowsett in the Cable Street houses ought now to be held in trust for the persons interested in the residuary estate of John Dowsett.

The summons was taken out by the trustees of the will of John Dowsett and the persons interested in his residuary estate.

J. M. Stone, for the plaintiffs. It is clear that there was no intention to give anything but the share in the particular houses, and that the appointment, having regard to the subsequent dealings with the property, has been adeemed. There is now no property upon which the appointment can operate: *Gale* v. *Gale* (1); *Blake* v. *Blake* (2); *Willett* v. *Finlay* (3); *In re Bagot's Settlement* (4); *Collinson* v. *Collinson* (5); Wills Act, 1837, s. 23. There is no distinction for this purpose between the case of a general and a special power of appointment: *In re Moses.* (6)

R. J. Parker, for some of the defendants. The real question is whether or no there has been ademption, having regard to the surrounding circumstances of the case and the nature of the property appointed: *In re Johnstone's Settlement.* (7) In *Cooper* v. *Martin* (8) Lord Cairns made some observations which support this view.

There is a distinct difference, in respect of ademption, between special and general powers. Where, as here, the power is special, the instrument by which the appointment is exercised must be read as if it were part of the instrument creating the power, and this rule is even stronger where, as here, the property subject to the power has been sold and the proceeds resettled upon the original trusts. The gift by appointment has not been adeemed.

F. Stallard, for other defendants.

Stone was not called upon to reply.

(1) 21 Beav. 349.
(2) 15 Ch. D. 481.
(3) (1891) 29 L. R. Ir. 156.
(4) (1862) 10 W. R. 607.
(5) 24 Beav. 269.
(6) W. N. (1900) 182.
(7) 14 Ch. D. 162.
(8) (1867) L. R. 3 Ch. 47.

FARWELL J. It is argued on behalf of the plaintiffs that there has been a failure by ademption, and that, therefore, there is no property on which the appointment can now operate. In my opinion that is the true view. In cases of this sort the question appears to me always to be one of construction. Has the testator executing the power of appointment expressed his intention to give the particular property, or the property which may from time to time represent the particular property subject to the power? In this case, so far as the words go, I have absolutely nothing but the bare description of the houses. Subject to what I will say in a moment about special powers, it appears to me that there is no difference in principle between a gift of "Blackacre" or of moneys specifically described, by virtue of property in "Blackacre," and an appointment under a general power of "Blackacre" or moneys so specifically described. If the testator, having made his will in those terms, afterwards parts with the property, the gift fails for the very excellent reason that there is nothing on which it can operate when the testator dies. A testator, whether he has property of his own or whether he has a power of appointment over property, can if he pleases use a form of words which will give effect to his intention, if he so desire it, that that property or any money or other property into which it may be changed, shall pass at his death to the object of his bounty. In the simple case of a gift or appointment of particular property, describing it as such, no such question can arise. That, I am of opinion, is the explanation of the cases which have been referred to by counsel for the plaintiffs: *Gale* v. *Gale* (1), *Blake* v. *Blake* (2), and *Collinson* v. *Collinson*. (3) They are decisions of different Masters of the Rolls; and in each case it was held that there was not enough to shew that more than the property described by the particular description passed. In *In re Johnstone's Settlement* (4), on the other hand, Malins V.-C. thought that there was enough to shew that the intention was to give the funds representing the particular property into whatsoever shape they might have been altered at the date of the testator's death.

(1) 21 Beav. 349.
(2) 15 Ch. D. 481.
(3) 24 Beav. 269.
(4) 14 Ch. D. 162.

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It has been contended on behalf of the defendants that there is a difference to be derived from the consideration that this is a special power. In my opinion that distinction is unsound. If the real meaning of the failure by ademption is that there is no subject-matter on which the instrument purporting to dispose of it can operate, that reason is equally forcible whether the intention to dispose arises upon a general or upon a special power.

Counsel for the defendants argued that the instrument executing the power ought to be read into the original instrument creating it, and he urged upon me that this was done only in the case of a special power and not in that of a general power. I do not altogether accede to that statement as a statement of law, because in the first place, for some purposes, you do read the instrument executing the power into the instrument creating it, even in the case of a general power; e.g., before the Conveyancing Act, 1881, a wife could not convey real estate to her husband by virtue of her estate, but she could appoint real estate to her husband, because the estate was fed out of the seisin of the original person creating the power. Nor is it true to say that, for all purposes, you read the instrument executing a special power into the instrument creating it. For example—and here is the fallacy of the argument which has been addressed to me for the defendants—you do not read it in so as to relate back to the period of the instrument creating the power: *Duke of Marlborough* v. *Lord Godolphin*. (1) If it were not so, there would be no question of lapse in instruments executing powers. In the case of the will of a person having a special testamentary power of appointment amongst children, suppose the donee of the power appoints to a child, who dies in the lifetime of its parent. The result is that the testator makes a gift which fails by reason of the death of the object. The same principle applies to the failure of the subject. I see no difference in principle between the failure of the object and the failure of the subject. The reason is the same in both cases. You do not read back the appointment into the original instrument creating the power so as to dis-

(1) (1750) 2 Ves. Sen. 78.

regard all subsequent circumstances. You have to read the power with the instrument creating it, and then you find that at the date when the instrument comes into operation either there is no person to take, or that there is no property on which the power can operate, and in either case the appointment fails. To my mind, therefore, there is no distinction for this purpose between general and special powers. The only possible distinction I can see that might be suggested would be that, inasmuch as it is easier to trace the property held under a special power, in most cases, because it is held by trustees who could probably point out any new form that it may have taken, there might be greater facility for the Court coming to the conclusion that the testator did intend, in a case where he had used ambiguous expressions, to give the property by the execution of his power into whatever shape it might have passed at the date of his death. There is nothing of the sort here: there is simply an appointment of "Blackacre"; and under those circumstances I can only say it has been adeemed, and that there has been a failure.

[Upon the question of costs, after some discussion, his Lordship came to the conclusion that, inasmuch as the case of *Gale* v. *Gale* (1) had to some extent been doubted by Lord St. Leonards in his work on Powers, 8th ed. p. 308, and possibly by others, the costs of all parties ought to be declared to be a charge on the property, with liberty to apply in order to raise them if they could not otherwise be raised and provided for.]

Solicitors for plaintiffs: *Stones, Morris & Stone.*
Solicitors for defendants: *Aldous & Welfare.*

(1) 21 Beav. 349.

G. A. S.

FARWELL J.
1901
Jan. 16, 17.

In re MAYO.
CHESTER *v.* KEIRL.

[1900 M. 1823.]

Will—Mistake—Number of Legatees—Illegitimate Children—Presumption—Evidence of Intention.

Bequest to the three children of A. born prior to her marriage. A. had in fact four such children in existence at the date of the will. The testator had acknowledged the paternity of the three younger children, but he was not the father of the eldest child:—

Held, that, in the absence of proof that the testator was aware of the eldest child's existence, the onus of which proof lay on that child, there was no presumption that he intended to include her in the gift.

Semble, if the testator had been aware of the actual number of children, direct evidence of his intention to benefit three particular children would have been inadmissible.

ORIGINATING SUMMONS.

By his will, dated November 3, 1891, J. R. Mayo devised and bequeathed all his estate of whatsoever nature or kind unto his executor upon trust to convert the same into money, and after payment out of the net proceeds thereof of his debts, funeral and testamentary expenses, and legacies, to divide the residue of such proceeds into thirteen equal parts, and to pay such parts respectively to, or hold the same in trust for, the respective persons thereinafter named, that is to say (inter alia), "a fourth, fifth, and sixth part for the three children respectively of Caroline Lewis born prior to her marriage with her present husband—one part for each such child"; and the testator appointed Edward Chester executor and trustee of his will.

The testator died on January 21, 1899. As it appeared that there were four children of Caroline Lewis born prior to her marriage with her first husband J. A. Lewis, in the will referred to as "her present husband," this summons was issued to determine who were entitled under the above gift.

The evidence shewed that, before her marriage to Lewis, Caroline Lewis had three illegitimate children, born in 1876, 1878, and 1880 respectively, of which the testator acknow-

ledged the paternity. It was also proved that in 1873, before her acquaintance with the testator, Caroline Lewis had an illegitimate daughter by another man, but an attempt by this child to prove that the testator was aware of her existence failed on the evidence.

On behalf of the testator's three children, evidence was tendered to shew that in giving instructions for his will he had expressed his intention to provide for those children.

Dauney, for the trustee, stated the question.

John Henderson, for the eldest child. The Court presumes that there is merely a mistake in the enumeration of the children, and that all in existence at the date of the will are intended to take: Theobald on Wills, 5th ed. p. 271; *Daniell* v. *Daniell* (1); *Yeats* v. *Yeats* (2), approved in *Newman* v. *Piercey* (3); *In re Groom*. (4) The proposed evidence of intention is inadmissible.

Dunham and *J. A. Strahan*, for the testator's three children. The testator cannot have intended to benefit a child of whose existence he was ignorant. The above rule does not apply to illegitimate children. In any case, it is only a legal presumption which may be rebutted: *Newman* v. *Piercey* (5); and for this purpose the declaration of intention is admissible: Stephen on Evidence, 5th ed. art. 91. If, in default of such a presumption, the eldest child is not excluded by the testator's ignorance of her existence, there is an equivocation, and the declaration of intention is admissible to ascertain which three children are intended: *Doe* v. *Needs*. (6)

Tanner, for the next of kin.

FARWELL J. In my opinion the proposed evidence of the testator's declaration of intention is inadmissible. I do not see how I could admit it consistently with the provisions of the Wills Act. In Wigram on Extrinsic Evidence, 4th ed. pl. 9, when discussing the question under what restrictions the admissibility of extrinsic evidence, in aid of the exposition of

(1) (1849) 3 De G. & Sm. 337.
(2) (1852) 16 Beav. 170.
(3) (1876) 4 Ch. D. 41, 46.
(4) [1897] 2 Ch. 407.
(5) 4 Ch. D. 48.
(6) (1836) 2 M. & W. 129; 46 R. R. 521.

FARWELL J.
1901
Jan. 16, 17.

In re MAYO.
CHESTER *v.* KEIRL.

[1900 M. 1823.]

Will—Mistake—Number of Legatees—Illegitimate Children—Presumption—Evidence of Intention.

Bequest to the three children of A. born prior to her marriage. A. had in fact four such children in existence at the date of the will. The testator had acknowledged the paternity of the three younger children, but he was not the father of the eldest child:—

Held, that, in the absence of proof that the testator was aware of the eldest child's existence, the onus of which proof lay on that child, there was no presumption that he intended to include her in the gift.

Semble, if the testator had been aware of the actual number of children, direct evidence of his intention to benefit three particular children would have been inadmissible.

ORIGINATING SUMMONS.

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ledged the paternity. It was also proved that in 1873, before her acquaintance with the testator, Caroline Lewis had an illegitimate daughter by another man, but an attempt by this child to prove that the testator was aware of her existence failed on the evidence.

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(1) (1849) 3 De G. & Sm. 337.
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(5) 4 Ch. D. 48.
(6) (1836) 2 M. & W. 129; 46 R. R. 521.

FARWELL J. 1901 MAYO, *In re.* CHESTER *v.* KEIRL.

a will, was consistent with the provisions of the Statute of Frauds, Wigram V.-C. says: "The question just suggested has become much perplexed by a want of proper attention, on the part both of the Courts and of text-writers, to the different *purposes* to which the admissibility of extrinsic evidence in aid of the exposition of wills may be applied, and to the different *nature* of the evidence which (with reference to such different purposes) parties have tendered for admission. It is said (and correctly), that the statute, by requiring a will to be in writing, precludes a Court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writing the only legitimate evidence of the testator's intention. 'No will is within the statute but that which is in writing; which is as much as to say, that all that is effectual and to the purpose must be in writing, without seeking aid of words not written. *Brett* v. *Rigden* (1) . . . .' At the same time, however, Courts of law, though precluded from ascribing to a testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will properly expounded contains. The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principle above mentioned—must be, that any evidence is admissible which, in its nature and effect, simply explains what the testator *has* written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of shewing merely what he *intended* to have written. In other words, the question in expounding a will is not,—What the testator meant? as distinguished from—What his words express? but simply—What is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises."

It is true that in the notes to Proposition VII. of the same work Wigram V.-C. states certain cases, including *Doe* v. *Needs* (2), which he finds difficult to reconcile with the general rule above stated, and the Court of Appeal may some time

(1) (1568) Plowd. 340, 345. (2) 2 M. & W. 129; 46 R. R. 521.

have to determine how far those cases are consistent with the Wills Act.

It is not, however, my duty to determine whether they should be extended to such a case as the present, as the point does not really arise.

The evidence as to the number of children Caroline Lewis actually had before her marriage with Lewis, and as to the testator's knowledge of the existence of those children, was both admissible and relevant; but, in my opinion, that evidence fails to shew that the testator had any knowledge of the existence of the eldest child, born in 1873. The onus of proving that knowledge lies on that child, and in the absence of that proof no case of latent ambiguity arises. This is not like the case of a gift to a specified number of legitimate children of a particular person, in which case there is a presumption that all the legitimate children in existence at the date of the will are intended. The testator has made a gift to the three children of Caroline Lewis born before her marriage with Lewis, knowing that she had three illegitimate children of which the testator was the father. In the absence of proof that he knew of the previous illegitimate child, there is no ground for holding that he intended to include her in this gift. It would be straining the presumption which applies in the case of legitimate children to hold that the testator intended to benefit another man's illegitimate child, born before his own three children, and of whose very existence he was ignorant. The testator's three children are, therefore, entitled to the fund.

Solicitors: *H. F. & E. Chester; Prideaux & Sons; George S. Goodman; J. Edgar Duffitt; Bower, Cotton & Bower, for Mayo & Son, Yeovil.*

G. R. A.

FARWELL J. 1901 PARKER, *In re.* STEPHENSON v. PARKER.

Kay J. disapproved of the rule in *Skrymsher* v. *Northcote*. (1) The analogous case of *Humble* v. *Shore* (2), deciding that a direction that a share of residue the trusts of which fail shall fall into residue is ineffectual, has been overruled by *In re Palmer*. (3) The rule has not been applied to a lapsed portion of a particular residue: *Champney* v. *Davy* (4), though there is no logical distinction between general and particular residue in this respect. Again, although no notice was taken of the gift over in *Skrymsher* v. *Northcote* (1), great weight is attached to it in the modern construction of wills. It justifies the Court in reading the word "survivors" as "others," as it shews that the testator intended the fund to go over, if at all, as a whole, and did not contemplate a partial failure of the principal gift: Theobald on Wills, 5th ed. p. 601. Applying the same principle to the present case, the gift of "the remaining part" must be treated as a residuary gift carrying the lapsed legacy.

FARWELL J. The residuary legacy of 2250*l*., part of one-third share of the testator's residuary estate, having lapsed, the question is whether it is carried by the gift of the remaining part of that share, or whether there is an intestacy. In support of the latter view *Skrymsher* v. *Northcote* (1) has been relied on, and it certainly bears a strong resemblance to the present case. In that case, as here, there was a gift over. I do not think it necessary to say whether *Skrymsher* v. *Northcote* (1) can stand after the decision in *In re Palmer* (3), because I consider myself bound to apply to this will the principle applied by the Court of Appeal in the analogous cases in which the word "survivors" has been read "others." It is true that this principle was not, as it might have been, applied in *Skrymsher* v. *Northcote* (1); but that may be explained by the fact that the principle under which such particular weight is attached to a gift over is comparatively modern in origin. Here the words "the remaining part" are ambiguous. They may mean whatever remains after deducting the sum of 4500*l*. in any event, or they may bear the sense of true residue, meaning whatever remains after

(1) 1 Swans. 566; 18 R. R. 142.
(2) (1847) 7 Hare, 247; 1 H. & M. 550, n.
(3) [1893] 3 Ch. 369.
(4) (1879) 11 Ch. D. 949.

deducting so much, if any, of that sum as is actually required. Assuming that *Skrymsher* v. *Northcote* (1) was well decided as the law then stood, I am nevertheless bound by the modern course of authority to attach great weight to the gift over, which shews that the testator intended that no part of the principal gift should fail unless all the children died without attaining vested interests. In the cases in which the word "survivors" has been read "others," the gift over has been held to shew that the fund is intended to go over as a whole, and only if there is a complete failure of the objects of the principal gift. In other words, the Courts have held that though in the absence of a gift over the word "survivors" must be construed strictly, a gift over for the reason above stated gives it a different signification. Applying the same principle and holding that the gift over shews that the testator was dealing with the share as a whole, which is inconsistent with any partial failure of the trusts thereof, I must construe the words "the remaining part" in the sense of true residue, so as to carry the lapsed residuary legacy to the three children who have attained twenty-one. In this connection it is not unimportant to observe that the ultimate gift in default of objects of the prior trusts is to the next of kin.

Solicitors: *Guscotte, Wadham & Bradbury, for Wightman & Parker, Sheffield; Geare & Pease, for Wake & Sons, Sheffield.*

(1) 1 Swans. 566; 18 R. R. 142.

G. R. A.

FARWELL J.
1901
Jan. 17.

In re HOWARD.
TAYLOR *v.* HOWARD.

[1900 H. 3558.]

Will — Annuity — Duration — Annuity to Wife "so long as she remains unmarried" — Death of Wife unmarried.

A testator directed his executor to set aside 200*l.* and thereout pay the testator's wife 3*l.* monthly so long as she remained unmarried, or until the 200*l.* became exhausted, the said payment of 3*l.* monthly to cease on the wife marrying again.

The wife died unmarried before the 200*l.* was exhausted.

Held, that her executrix was entitled to the balance.

Rishton v. *Cobb*, (1839) 5 My. & Cr. 145, 152; 48 R. R. 256, followed.

ORIGINATING SUMMONS.

By his will, dated February 3, 1899, William Howard appointed the defendant executor and trustee thereof, and, after giving his furniture to his wife Amelia Howard and making sundry other bequests, provided as follows :—

"I desire my said executor and trustee to set aside 200*l.*, and thereout pay to my said wife, the said Amelia Howard, the sum of 3*l.* monthly so long as she remains unmarried or until the said sum of 200*l.* becomes exhausted, the said payment of 3*l.* monthly to cease on my said wife marrying again."

The testator died on May 8, 1899.

The wife died on May 31, 1900, without having married again, and, the sum of 200*l.* not being exhausted, this summons was issued to determine whether the plaintiff, her executrix, was entitled to the balance.

Dickinson, for the plaintiff. The wife's interest was not determined by her death. In the somewhat similar case of *Rishton* v. *Cobb* (1), Lord Cottenham says: "Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must

(1) 5 My. & Cr. 145, 152; 48 R. R. 256.

determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest."

G. E. Fryer, for the defendant. The above dictum in *Rishton* v. *Cobb* (1) covers the present case, but, having regard to Lord Selborne's remarks in *In re Boddington* (2), that case cannot be supported.

FARWELL J. I understand Lord Selborne to mean that *Rishton* v. *Cobb* (1) can be supported on the ground stated by Lord Cottenham in the above passage. The Court of Appeal did not, and in my opinion could not, overrule it, and it is binding on me. The plaintiff is therefore entitled to the balance of the 200*l.*

Solicitors: *Colman & Knight; W. H. Martin & Co.*

(1) 5 My. & Cr. 145, 152; 48 R. R. 256. (2) (1884) 25 Ch. D. 685, 689.

G. R. A.

BUCKLEY J.

1900

March 27, 28, 29, 30; *April* 6. (1)

SACCHARIN CORPORATION, LIMITED *v.* ANGLO-CONTINENTAL CHEMICAL WORKS.

[1898 S. 4001.]

Patent—Infringement—Article made Abroad by the Use of Material Manufactured by the Patented Process—Importation into and Sale in England — Costs — Certificate that Validity of Patent has come in question— "Subsequent Action"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 31.

The defendant imported into and sold in this country an article made abroad. A material made by a process similar to that protected by the plaintiffs' patent was used in the manufacture. The nature of this material was chemically changed by subsequent operations in the course of the manufacture, and the imported article was the material after such chemical change:—

Held, that the defendants were indirectly depriving the patentees of the benefit of their invention, that they had infringed the patent, and that they must be restrained from so doing.

In s. 31 of the Patents, Designs, and Trade Marks Act, 1883, the words "any subsequent action" mean an action commenced after the certificate was granted.

Action for infringement of a patent for the manufacture of ortho-toluene-sulpho-chloride, a coal tar product used in the manufacture of saccharin. After the ortho-toluene-sulpho-chloride had been manufactured it was necessary for the production of saccharin first to change the chlorine for an amide group, and then to oxidize into saccharin and water. The defendants imported into and sold in this country saccharin made in Switzerland by the use of ortho-toluene-sulpho-chloride manufactured by a process substantially similar to that protected by the plaintiffs' patent, and they contended, inter alia, that the nature of the ortho-toluene-sulpho-chloride was so changed by the subsequent operations that the importation of the saccharin was not an infringement of the patent.

The patent had already formed the subject of an action of *Saccharin Corporation* v. *Chemicals and Drugs Co.* (2), in

(1) As to subsequent proceedings in Court of Appeal, see post, p. 418.

(2) (1899) 17 Rep. Pat. Cas. 28.

which North J., on December 9, 1899, had upheld the validity of the patent.

Moulton, Q.C., Cripps, Q.C., J. C. Graham, and *H. A. Colefax,* for the plaintiffs.

Neville, Q.C., Roger Wallace, Q.C., Lord Robert Cecil, Q.C., A. J. Walter, and *J. A. S. Bucknill,* for the defendants. The importation into this country of an article which has been produced only in part by the use of the patented process is not an infringement of the patent. The article imported and sold in this case is not the thing made under the patent, but something subsequently made by the use of the thing produced under the patent. The substance made under the patent is ortho-toluene-sulpho-chloride, and that has not been imported. The nature of it has been changed by the subsequent operations employed in the manufacture of saccharin. In this case the patented process was only the first of the series of operations resulting in the production of saccharin. If it had been the last step, it may be that this contention could not be maintained.

M. Romer, for another defendant.

Moulton, Q.C., in reply. The defendants have imported and sold saccharin manufactured by the use of the patented process. It makes no difference that by subsequent operations they have altered the character of the product, or that the patent does not cover the whole of the imported article. The patented process is a necessary step in the manufacture of saccharin. We could restrain any manufacturer from making saccharin in this country by the use of our process in this way. The defendants admitted before North J. that our patented process had been used in the manufacture of their saccharin. If a machine is patented in this country, the importation of articles made abroad by a similar machine is an infringement. The point is covered by decisions that no one may directly or indirectly deprive a patentee of the benefit of his invention: *Elmslie* v. *Boursier* (1); *Von Heyden* v. *Neustadt.* (2)

Cur. adv. vult.

(1) (1869) L. R. 9 Eq. 217. (2) (1880) 14 Ch. D. 230.

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April 6. BUCKLEY J., following on one point the decision of North J. in *Saccharin Corporation* v. *Chemicals and Drugs Co.* (1), held that the patent was valid, and continued:—The article imported and sold, therefore, is produced by certain subsequent chemical operations from the article produced under the patented process. The article imported and sold is not ortho-toluene-sulpho-chloride, but ortho-toluene-sulpho-chloride is contained in saccharin. The defendants say that the importation of that article is not an infringement. Now, the grant contained in letters patent is a grant to the patentee to make, use, exercise, and vend the invention, and to have and enjoy the whole profit and advantage by reason of the invention, and, to the end that he may have and enjoy the sole use and exercise and the full benefit of the invention, all others are precluded from either directly or indirectly making, using, or putting in practice the said invention, or any part of the same, or in anywise imitating the same. Accordingly, it was held in *Elmslie* v. *Boursier* (2) that the importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement—a decision which was followed by the Court of Appeal in *Von Heyden* v. *Neustadt.* (3) In the latter case James L.J., in giving the judgment of the Court, said: "A person who makes, or procures to be made, abroad for sale in this country, and sells the product here, is surely indirectly making, using, and putting in practice the patented invention." Having regard to the facts of that case, the words "and sells" may be read "or sells." Neither this case nor *Elmslie* v. *Boursier* (2) entirely cover the point which I have now to decide, but in my judgment their principle does determine it. If the patented process were the last stage in the production of the article sold, the importation and sale of the product would, in my opinion, plainly be an infringement; and does it make it any the less an infringement that the article produced and sold is manufactured by the use of the patented process with the subsequent use of certain other processes? In my opinion it does not. By the sale of saccharin, in the

(1) 17 Rep. Pat. Cas. 28. (2) L. R. 9 Eq. 217.
(3) 14 Ch. D. 230, 233.

course of whose production the patented process is used, the patentee is deprived of some part of the whole profit and advantage of the invention, and the importer is indirectly making use of the invention. In my judgment, therefore, this contention fails.

[His Lordship further held upon the evidence that the process used by the foreign manufacturers in producing the saccharin, which it was admitted had been introduced into this country by the defendants, was substantially the process covered by and an infringement of the patent. He therefore granted an injunction, and ordered the defendants to pay the costs of the action.]

Moulton, Q.C., for the plaintiffs, asked for costs as between solicitor and client, in accordance with s. 31 of the Patents, Designs, and Trade Marks Act, 1883, on the ground that North J. had on December 9, 1899, granted a certificate that the validity of the patent had come in question in the action before him.

Lord R. Cecil, Q.C., for the defendants, submitted that, inasmuch as the present action was commenced on October 26, 1898, before the certificate was granted, it was not a "subsequent action" within the section: Frost's Patent Law and Practice, 2nd ed. p. 625; *Automatic Weighing Machine Co.* v. *Combined Weighing Machine Co.* (1); *Automatic Weighing Machine Co.* v. *International Hygienic Society.* (2)

BUCKLEY J. This question has already been decided by Charles J. in *Automatic Weighing Machine Co.* v. *International Hygienic Society.* (3) He says, speaking of s. 31: "It says that 'in an action for infringement of a patent, the Court or a judge may certify that the validity of the patent came in question, and, if the Court or judge so certifies, then, in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges and expenses as between solicitor and

(1) (1889) 6 Rep. Pat. Cas. 120. (2) (1889) 6 Rep. Pat. Cas. 475.
(3) 6 Rep. Pat. Cas. 480.

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client, unless the Court or judge trying the action certifies that he ought not to have the same.' Now, what do the words 'any subsequent action for infringement' mean? I cannot entertain a doubt that they mean actions subsequent to the certificate. It seems to me clearly so. First of all, the judge is to certify. Well, here is Kekewich J.'s certificate, dated December 13, 1888, that the validity of the plaintiffs' patent came in question before him. 'And if the Court or judge so certifies'—and Kekewich J. did so certify—'then in any subsequent action'—surely that must mean an action subsequent to that certificate. This action is not subsequent to the certificate; it was an action commenced before the certificate of Kekewich J. was made." In the present case this action was commenced in 1898, before the certificate of North J. was made, and I decline to make an order for payment of solicitor and client costs.

Solicitors: *J. H. & J. Y. Johnson; Joseph W. Asprey; Deacon, Gibson & Medcalf.*

H. C. R.

The defendants appealed against this decision.

The appeal was heard on November 20, 21, 22, and 23, 1900, when the Court reserved their judgment. The reporter has been informed by the junior counsel on both sides that, before judgment could be delivered, the parties came to an arrangement, and that consequently no judgment was delivered.

W. L. C.

BLACKBURNE *v.* HOPE-EDWARDES.

BUCKLEY J.

1900 July 24.

[1900 B. 2908.]

Rent-charge—Charge on Fee Simple—Application to raise Arrears by Sale—Effect of creating Term.

Where a rent-charge is charged on the fee simple, but a term of years is vested in trustees upon trust that when the rent-charge is in arrear the trustees shall out of the rents and profits, or by mortgaging or demising the term, raise and pay the rent-charge, the owner of the rent charge must resort to the term, and is not entitled to an order for sale of the fee simple to raise arrears of the rent-charge.

Hall v. *Hurt*, (1861) 2 J. & H. 76, followed.

By a deed executed in 1867 prior to and in contemplation of a marriage between William John Hope-Edwardes and Emily Blackburne, after reciting that the marriage had been agreed upon, and that upon the treaty for the same it was agreed that Thomas Henry Hope-Edwardes, the bridegroom's father, should provide for him in case the marriage should take place, and for Emily Blackburne, by way of jointure, in the event of her becoming his widow, a yearly rent-charge of 500*l.*, and that the same should be charged upon certain lands in manner thereinafter expressed, it was witnessed that in consideration of the marriage T. H. Hope-Edwardes granted and confirmed unto St. Leger Frederick Hope-Edwardes and Foster Grey Blackburne certain lands and hereditaments, to hold the same unto them and their heirs to the use of T. H. Hope-Edwardes, his heirs and assigns, until the marriage, and thereafter to the use that W. J. Hope-Edwardes and his assigns should, during the joint lives of himself, Emily Blackburne, his wife, and T. H. Hope-Edwardes, receive a yearly rent-charge of 500*l.*, and to the further use that after his death Emily Blackburne, in case she should become his widow, and her assigns, might receive during her life the like rent-charge of 500*l.*, to be charged upon and issuing and payable out of the lands; and to the further use that, in case either of the yearly rent-charges or any part thereof should at any time be in arrear and unpaid

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for twenty-one days, it should be lawful for W. J. Hope-Edwardes and his assigns, and for Emily Blackburne and her assigns, as the case might be, to enter into and distrain upon all or any part of the lands, and to dispose of the distress and distresses then and there found according to law, as landlords might for rents reserved upon leases for years, to the intent that thereby or otherwise the yearly rent-charges and every part thereof so in arrear and unpaid, and all costs, charges, and expenses occasioned by reason of the non-payment thereof, should be fully paid and satisfied; and to the further use that, in case either of the yearly rent-charges or any part thereof should at any time or times be in arrear and unpaid for the space of forty days, it should be lawful for the said W. J. Hope-Edwardes and his assigns, or for Emily Blackburne and her assigns, as the case might be, to enter into or upon and to hold all or any part of the premises thereby assured, and to receive and take the rents and profits thereof, the possession to be without impeachment of waste. And it was thereby declared that, subject to and charged with the rent-charges and the powers and remedies for enforcing payment thereof, the lands should be held to the use of St. L. F. Hope-Edwardes and F. G. Blackburne, their executors, administrators and assigns, for the term of ninety-nine years from the solemnization of the marriage, without impeachment of waste, upon the trusts thereinafter declared concerning the same, and, subject to the term, to the use of T. H. Hope-Edwardes, his heirs and assigns. And it was also declared that the lands were limited to St. L. F. Hope-Edwardes and F. G. Blackburne for the term of ninety-nine years upon trust that, if either of the rent-charges should be in arrear for sixty days, then, and so often as the same should happen, St. L. F. Hope-Edwardes and F. G. Blackburne should by and out of the rents and profits, or by mortgaging or demising the lands for all or any part of the term, or by bringing actions against the tenants or occupiers of the lands for the recovery of the rents and profits thereof, or by other reasonable ways or means, raise and pay the rent-charges.

The marriage between W. J. Hope-Edwardes and Emily Blackburne took place in July, 1867. He died in the same

year; and she in 1873 by deed assigned the rent-charge to the plaintiff and another trustee (who died in March, 1899) upon certain trusts.

T. H. Hope-Edwardes died in 1871, having by his will devised his real estate in the county of Salop, which included the hereditaments charged with the rent-charge, to his children in strict settlement.

The rent-charge having fallen into arrear to the amount of over 1200*l.*, and the rents of the property, after deducting the necessary outgoings, being insufficient to pay the rent-charge, the present action was brought by the surviving trustee of the deed of 1873 against the persons interested under the will, and F. G. Blackburne, as surviving trustee of the deed of 1867, for payment of the arrears of the rent-charge, and an order that the amount might be raised by a sale of the lands charged or some competent part thereof.

The widow of W. J. Hope-Edwardes was aged about fifty-four years.

It was admitted that, owing to the small rental and the outgoings, it would not be convenient to charge the arrears of rent-charge on the lands by way of mortgage.

H. Terrell, Q.C., and *J. Rutherford*, for the plaintiff. The question is whether the arrears of the rent-charge are to be raised by a sale, under the order of the Court, of the inheritance or a sufficient part of it, or by enforcing the trusts of the term. The plaintiff has a legal rent-charge, and is entitled to an order for sale of the inheritance. The fact that the rent-charge is also secured by the term of ninety-nine years does not interfere with the right to resort to the corpus. It would prejudice the plaintiff's interests to raise the arrears by a mortgage, for in such a case the security would diminish each year.

[They referred to *In re Tucker* (1); *Hambro* v. *Hambro*. (2)]

Astbury, Q.C., and *W. Brinton*, for the defendants other than F. G. Blackburne. The owner of the rent-charge can only raise the arrears by charging the term: *Hall* v. *Hurt*. (3)

(1) [1893] 2 Ch. 323. (2) [1894] 2 Ch. 564. (3) 2 J. & H. 76.

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Even if the term were non-existent, the Court would have a discretion whether it would or would not order a sale: *Hambro* v. *Hambro*. (1) There was a term in *Taylor* v. *Taylor* (2), but the case was decided on another ground.

If there was power to sell the inheritance to raise the arrears, it is difficult to see why the term was inserted.

[They also referred to *Champernoon* v. *Gubbs* (3); *Horton* v. *Hall* (4); *Cupit* v. *Jackson* (5); *Doe* v. *Lord Kensington* (6); Davidson's Conveyancing, 3rd ed. vol. iii. pp. 315, 447.]

[BUCKLEY J. referred to *Scottish Widows' Fund* v. *Craig*. (7)]

E. Ford, for the defendant F. G. Blackburne.

H. Terrell, Q.C., in reply, referred to *Graves* v. *Hicks* (8); *Hooper* v. *Cooke*. (9)

BUCKLEY J. In this case I think I ought to follow the decision in *Hall* v. *Hurt*. (10) [His Lordship referred to the deed creating the rent-charge and to the will of T. H. Hope-Edwardes, and continued:—]

The property subject to the rent-charge of 500*l*. consists of the central portion of the settlor's property. The rent-charge was paid until 1895, but owing to the depreciation in the value of land it has since fallen into arrear. The parties to the action have endeavoured, but without success, to come to some arrangement. Under the deed a term of years is created to secure the rent-charge; but it is admitted by all parties that to raise and keep down the arrears of the annual charge by a sale or mortgage of the term would not be a convenient course. It is not disputed that the arrears ought to be paid, and the question which I have to decide is whether payment is to be enforced by a sale of the inheritance. There are cases in which the Court has given its assistance to owners of rent-charges by ordering the property charged to be sold although

(1) [1894] 2 Ch. 564.
(2) (1874) L. R. 17 Eq. 324.
(3) (1700) 2 Vern. 382.
(4) (1874) L. R. 17 Eq. 437.
(5) (1824) 13 Price, 721; 28 R. R. 735.
(6) (1846) 8 Q. B. 429, 450.
(7) (1882) 20 Ch. D. 208.
(8) (1841) 11 Sim. 551.
(9) (1855) 20 Beav. 639; on appeal (1856) 25 L. J. (Ch.) 467.
(10) 2 J. & H. 76.

there was no express power of sale. The earliest of these cases is *Cupit* v. *Jackson* (1), and the result of the cases is that, subject to the discretion of the Court, the owner of a rent-charge is entitled to an order for sale of the inheritance, but that the Court will refuse to make the order in certain cases, for instance, where a sale is not necessary for any other purpose and it is advisable to wait for a time: *Graves* v. *Hicks* (2), or an immediate sale ought not under the circumstances to be imposed on the parties interested in the estate: *In re Tucker*. (3) But what is the effect of vesting a term in trustees, as in the present case? In *Hall* v. *Hurt* (4) Wood V.-C. thought that the existence of a term altered the rights of the parties. He was asked to make an order for sale of the fee simple for payment of the arrears of a rent-charge of 300*l.* and a sum of 5000*l.*, and he made an order for sale based on the rent-charge and not on the 5000*l.* His reasons are thus stated in the judgment: "This case involves a very short point. I think it turns entirely on the question, whether a sale can be directed for the arrears of the annuity; for I do not feel, that I can safely rest it upon the construction contended for, in argument, of the words creating the charge of 5000*l.* Looking at the whole contents and scope of the will, my impression is, that the freehold was not intended to be sold to raise the charge of 5000*l.*, but that the term was created for that purpose, with the view of avoiding a sale of the fee."

Although that was a decision on the construction of a particular will, it is of assistance to me in the present case, and shews that the Court ought to see whether the existence of the term is consistent with the right to have a sale ordered by a Court of Equity. Here I find a rent-charge issuing out of land which is secured by a term. There is express power to raise the arrears of the rent-charge by a mortgage of the term. Having regard to the term and to what was said in *Hall* v. *Hurt* (4), I do not see how I can make the order which is asked for. I must therefore only order an account to be

(1) 13 Price, 721; 28 R. R. 735.
(2) 11 Sim. 551.
(3) [1893] 2 Ch. 323.
(4) 2 J. & H. 76, 78.

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taken of the arrears, and declare that they are not to be raised by a sale or mortgage of the inheritance. (1)

Solicitors for plaintiff: *Field, Roscoe & Co., for Greenall & Buckton, Warrington.*

Solicitors for defendant F. G. Blackburne: *Rowcliffes, Rawle & Co., for P. & J. Watson, Bury.*

Solicitors for other defendants: *Chester, Broome & Griffithes, for Peele & Peele, Shrewsbury.*

F. E.

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[1900 E. 47.]

Married Woman—Will—Invalid Bequest—Assent of Husband—Administration with Will Annexed—Assent given after Wife's Death—Construction—"All I have Power to dispose of by this my Will"—No Power to dispose except with Husband's Assent.

In order to make the will of a married woman valid as a disposition of property which she has no power to dispose of without her husband's assent, it is not necessary that his assent should be given during her life: assent given after her death is sufficient.

Ex parte Fane, (1848) 16 Sim. 406, followed.

A married woman entitled to a reversionary interest, and having under a settlement a power of appointment over other property but not over the reversionary interest, made a will whereby she appointed the settlement funds "and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will" to certain persons. Her husband did not assent to her will during her life, but after her death he gave his assent, in a form which recited that he was entitled to his wife's personal estate over which she had no disposing power, to administration with the will annexed being granted in general form to the executors therein named:—

Held, that the assent of the husband given after his wife's death would have been sufficient to make her will a valid disposition of the reversionary interest if she had purported to dispose of it; but that, as a matter of construction, the gift in the will did not include that interest, and that the husband had not assented to the will as dealing with it.

On February 10, 1863, Mr. Elliot married Harriet, Countess of Guilford, then a widow, and by a settlement made on

(1) The report of this case was held over to await the result of an appeal, which was, however, abandoned.

February 6, 1863, before the marriage, certain personal estate, the absolute property of the Countess, was settled upon such trusts and for such interests and purposes as she should, notwithstanding coverture, by deed or will appoint.

On November 10, 1871, a son of the Countess by her former marriage died intestate and without issue, and she as one of his next of kin became entitled to a reversionary interest in personal estate expectant on the determination of the life interest of the son's widow.

On April 8, 1872, the Countess made her will, and thereby, after reciting the power of appointment given her by the settlement, made various appointments thereunder, and she directed and appointed "all the rest, residue, and remainder of the said" trust funds, "inclusive of any other portion of the said funds as (1) may lapse, and any balance I may have at my bankers, and all ready money and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will, and which I have not hereby disposed of, but not including any furniture or effects which at the time of my marriage were in or about the leasehold house in Grosvenor Street, then belonging to me, unto and equally between" the defendants.

It was admitted that the Countess had a balance at her bankers which formed part of her separate estate, and that the furniture was included in the settlement. She died on April 16, 1874, leaving her husband surviving her. He did not give any assent to her will during her life, but on May 19, 1874, signed an assent as follows: "Whereas the Right Honourable Harriet Countess of Guilford wife of me the undersigned John Lettsom Elliot . . . . died on the 16th day of April 1874 . . . . having during her coverture with me by virtue of certain powers and authorities given to and vested in her by an indenture of settlement bearing date the 6th day of February 1863 and of other powers and authorities her enabling made and executed her last will and testament bearing date the 8th day of April 1872 and thereof appointed her son the Honourable Frederic Henry North and her son-in-law Henry Jeffreys Bushby Esquire

(1) *Sic.*

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executors. And whereas I the said John Lettsom Elliot as the lawful husband of the said deceased am the sole person entitled to her personal estate and effects over which she had no disposing power and concerning which she is dead intestate. Now I the said John Lettsom Elliot . . . . do hereby declare that I expressly consent that letters of administration with the will annexed of all and singular the personal estate and effects of the said deceased be committed and granted to the . . . . executors named in the said will."

A grant of administration was thereupon made which stated the circumstances and the assent signed by Mr. Elliot and proceeded: "And be it also known that on the 2nd of June, 1874, letters of administration (with the said will annexed) of all and singular the personal estate and effects of the said deceased were granted and committed by Her Majesty's High Court of Probate to" the defendants.

Mr. Elliot died in 1898, and the plaintiffs were his executors. They called upon the defendants to assign the reversionary interest expectant on the determination of the life interest of the Countess's son's widow, who was still living, to them, and on their declining to do so brought this action for a declaration that the defendants held it in trust for Mr. Elliot and the plaintiffs as his executors, and for an order on them to assign it accordingly.

W. F. Hamilton, Q.C., and *J. W. Brodie Innes*, for the plaintiffs. The defendants are trustees of this reversionary interest for the plaintiffs subject to the life interest of the son's widow: *Squib* v. *Wyn* (1); *Smart* v. *Tranter*. (2) The Countess had no power of appointment over it; she could only dispose of it by will if her husband assented to that will. It was necessary that he should give his assent to it both during her life and after her death, for assent given during her life was revocable at any time. He did not assent to it during her life; and an assent given after her death is not sufficient to validate the will. On her death this reversionary interest vested in her husband for all purposes, although he would not

(1) (1717) 1 P. Wms. 378. (2) (1890) 43 Ch. D. 587.

be able to give a discharge for it until he had taken out administration to her. The consent is in the common form in use in 1874; and the fact that the grant of administration with the will annexed was made to the defendants and covered "all and singular the personal estate and effects of the deceased" does not affect the beneficial title to the property. It was the ordinary practice at that time to make a general grant if the husband assented. If he did not assent the grant was limited, and he was entitled to a grant of administration cæterorum: Coote's Common Form Practice in the Court of Probate, 3rd ed. p. 41; Williams on Executors, 9th ed. pp. 323, 324; *In the Goods of De Pradel.* (1) Since the Married Women's Property Act, 1882, and the Probate Rules (Non-contentious Business), 1887, the practice has been altered: *In the Goods of Price.* (2) There is no authority for the proposition that assent given after her death made a married woman's will valid except *Ex parte Fane* (3), and in that case the husband had also assented during his wife's life. (4) Under the present practice a grant of probate in general form does not operate as an assent: *In re Atkinson.* (5) It is true that in that case Lindley M.R. said (6) that "no doubt under the old law that would have been an assent to the will." But that observation was merely a dictum; the case was decided upon the construction of the will.

[BUCKLEY J. The same remark was made by Stirling J. in *In re Atkinson.* (7)]

It is inconsistent with *Willock* v. *Noble* (8), and there is no case which supports that view. In *Brook* v. *Turner* (9) and *Maas* v. *Sheffield* (10), which were referred to in *In re Atkinson* (5), the assent was given during the wife's life.

On the construction of the will we submit that the testatrix has not attempted to deal with this reversionary interest. She

(1) (1867) L. R. 1 P. & M. 454.
(2) (1887) 12 P. D. 137.
(3) 16 Sim. 406.
(4) The petition in *Ex parte Fane* was produced to the Court, and shewed that the husband had during his wife's life assented to her will.
(5) [1899] 2 Ch. 1.
(6) Ibid. 5.
(7) [1898] 1 Ch. 637, 641.
(8) (1875) L. R. 7 H. L. 580.
(9) (1676) 2 Mod. 170.
(10) (1845) 1 Rob. Ecc. 364.

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gives all the property which she has power to dispose of by her will, and it is clear that she had not power at any time during her life so to dispose of it. Even if she has attempted to dispose of it, the husband has not assented to the disposition. The assent recites that she died intestate as to some of her property.

Hughes, Q.C., and *J. H. Gregson*, for the defendants. Assent given after the wife's death is sufficient. It is more important than assent given during her life, for that may be revoked. The husband has been content to stand aside and let her dispose of the property, instead of taking it himself. That is an assent to the will as a whole. He has given up his right: *Noble* v. *Willock*. (1)

[They were stopped on this point.]

On the question of construction we submit that this reversionary interest is included in the gift of everything she had power to dispose of by will. She had power to dispose of it by will if her husband assented to it. The parcels would be enlarged by the subsequent assent. It is an accurate use of language. If a trustee has a conditional power to grant leases with the consent of the tenant for life, that is correctly described as a power to lease. If the plaintiffs are right, everything on which it could possibly operate is excluded from this clause. This question was considered in *In re Atkinson* (2), and the only ground on which the property was held not to be included in the bequest was that the property was given to the husband, who would have taken it even if there had been no will; and it was therefore unreasonable to suppose that the testatrix intended to include it. The Court clearly thought she had a disposing power, and on the words of the Countess's will they would have been in our favour. It is a question of the intention of the testatrix. "Dispose of" is a very general term: *Chappell* v. *Charlton* (3); Hawkins on Wills, p. 28.

The husband's written assent includes assent to the gift of this reversionary interest. It contemplates the operation

(1) (1873) L. R. 8 Ch. 778, 789, 790. (2) [1899] 2 Ch. 1.
(3) (1887) 56 L. J. (P. D. & A.) 73, 74, n. 2.

of the clause on other property, and is an assent to every disposition she has made.

No reply was called for.

BUCKLEY J. stated the facts, and proceeded:—Now, apart from the will and the construction of the will, one or two things in the outset, I apprehend, are plain. When the Countess of Guilford died on April 16, 1874, entitled to this reversionary interest, the right to it vested in her surviving husband, and he was entitled to take it, and was master of it, and could give a discharge for it if he took out letters of administration to his wife's estate. This also, I think, is plain: that if he did not take out administration to his wife's estate, but somebody else did, the person who so took out administration would be a trustee for him. After the Statute of Distributions had been passed (22 & 23 Car. 2, c. 10) a doubt seems to have arisen as to what was the effect of that statute upon the rights of surviving husbands in respect of their wives' personal estate, and accordingly there was appended to the Statute of Frauds—a place where one would scarcely expect to find it—a section which provided that for the purpose of explaining the Statute of Distributions it was declared: "That neither the said Act, nor anything therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act." There are authorities, beginning with *Squib* v. *Wyn* (1), extending to *Humphrey* v. *Bullen* (2) and *Elliot* v. *Collier* (3), from which it is quite plain that the reversionary interest of the wife vests in the surviving husband immediately upon the death of the wife even before he has taken administration to her; that her next of kin have no right under the Statute of Distributions; that the husband is the person entitled; and that whether he takes administration or somebody else takes

(1) 1 P. Wms. 378. (2) (1737) 1 Atk. 458.
(3) (1747) 3 Atk. 526.

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administration, the beneficial interest in the wife's personal estate is vested in the husband. Those cases were reviewed, and the last authority upon them is to be found in *Smart* v. *Tranter*. (1)

Now, that proposition I do not understand to be disputed; but, say the defendants, a wife under the old law could always make a will of personal estate with the assent of her husband, and Mr. Elliot assented. Mr. Hamilton has sought to argue that the assent of the husband must be given in the lifetime of the wife. I do not think that proposition can be maintained. I think that the doctrine rests upon this, that the wife under the old law, being a person incapable of disposing of her personal property, was, nevertheless, treated as being a person who could dispose of it if the husband, who was absolutely entitled if she did not dispose of it, was content to stand aside. He could stand aside by an assent to her will given in her lifetime if he were so minded; but if he had assented, he could revoke his assent at any time he liked. Up to the very time the wife was in extremis he could revoke the assent if previously given, or could refuse to give it. If she was dead, he could equally, by taking certain steps, treat her will as being an effectual will so as to pass the property adversely to him, although he could have taken up a different attitude. Now, that I think is plain, not so much from *Ex parte Fane* (2) as it is reported, as from the way in which I understand that authority has ever since been used. I need not go further than to state that in the case of *In re Atkinson* (3) the law was treated as being such, and I need scarcely say that that is binding upon me. In that case (4) Stirling J. said this: "The question under these circumstances is, Does the probate by the husband of this will operate as an assent by him?"—the probate by the husband of the will was of course an act done after the death of the wife. "Under the old practice I think it was settled that it did so operate. The case of *Ex parte Fane* (2) is an authority to that effect. There the

(1) 43 Ch. D. 587.
(2) 16 Sim. 406.
(3) [1898] 1 Ch. 637; [1899] 2 Ch. 1.
(4) [1898] 1 Ch. 641.

husband, having the option of having the will proved so far as it was an effectual disposition of property and taking the grant of administration cæterorum, chose to prove the will generally, and it might very well be held that that was an assent to the will." In the Appeal Court Lord Lindley, who was then the Master of the Rolls, put it even more plainly. He said this (1): "As I understand the authorities, the husband is at liberty during the life of his wife to license her to make a will and to revoke that licence, but if after her death he has really assented to her will he cannot revoke it. Now, before Stirling J. the case was argued upon the question whether the husband had assented, and the plaintiffs relied mainly upon the ground that he had proved the will in general form in May, 1892, and no doubt under the old law that would have been an assent to the will." Lord Lindley did not mean an assent to the will which could have no effect, but an effectual assent to the will so as to give validity to the disposition made by the wife which otherwise would have been invalid. I consider, therefore, that here an assent given by Mr. Elliot, after the death of the Countess, to her will, if it was a will disposing of this reversionary interest, would have been such as to constitute that an effectual disposition. But now what took place was this. The will in question was proved on June 2, 1874, and at that time the practice of the Probate Court differed from the practice as it is now, and has been since 1887. Under the practice as it was in 1874 the Court of Probate would give probate of a married woman's will limited to property over which she had a power of disposal to the executors under the will, and then would make a grant of administration cæterorum to the husband. They do not do so now—they make one grant; but in 1874 the practice was to do that. Mr. Elliot did not, however, apply for a grant cæterorum; what happened was this. On May 19, 1874, he signed this assent, and this is what is relied upon as being his assent to his deceased wife's will as a disposition of property of which she could not dispose except with his consent. It recites that the lady died in 1874, having, during her coverture with

(1) [1899] 2 Ch. 5.

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Mr. Elliot, by virtue of certain powers and authorities "vested in her by an indenture of settlement of the 6th February, 1863, and of other powers and authorities her enabling made and executed her last will and testament bearing date the 8th day of April, 1872, and thereof appointed" Mr. North and Mr. Bushby executors. Then it contains these words: "And whereas I the said John Lettsom Elliot, as the lawful husband of the said deceased, am the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she is dead intestate." That recital, I think, plainly means that he was the person entitled to property of which she died intestate, namely, property over which she had no disposing power under that settlement which had been mentioned. Then he declares that he consents "that letters of administration with the said will annexed of all and singular the personal estate and effects of the said deceased be committed and granted to the said Frederic Henry North and Henry Jeffreys Bushby"; and upon that consent a grant of administration with the will annexed was made by the Probate Court. [His Lordship read it.]

Now, what was that assent? It seems to me that it was an assent by the husband to a general grant of administration to the defendants of all and singular the personal estate and effects of the deceased, namely, both those over which she had a testamentary power and those to which he was entitled as the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she died intestate. In other words, so far as regards the property that was not included in the power, it was an assent by the person who was entitled, according to the practice of the Probate Court, to take administration, namely, the husband, to a grant of administration to somebody else. If that is so it falls within *Squib* v. *Wyn* (1) and those cases, and the person who does so get administration is a trustee for the husband who is the person beneficially entitled.

Then it is said that that is not so because the will has a larger effect than that which I have attributed to it. Now, the will is

(1) 1 P. Wms. 378.

in these terms. It recites the settlement and it proceeds to make various appointments under the power contained in the settlement, and then it goes on to appoint all the rest, residue, and remainder of the funds which are included in the settlement. Then it goes on thus: "And any balance I may have at my bankers." Now, it is pleaded and admitted that the testatrix had a balance at her bankers which formed part of her separate estate and which she could dispose of. "And all ready money and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will and which I have not hereby disposed of," but not including certain things which were included in the settlement; and it has been argued for the defendants that that was a disposition purporting to be made by the lady of property not included in the settlement, but property of which she could only dispose with the assent of her husband. In my opinion that is not the true construction of this will. It is "all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will and which I have not hereby disposed of"; that is to say, "I have made certain dispositions under my testamentary power, and if I have not exhausted the whole of that or all my separate estate then I dispose of anything else which I can dispose of by this my will." As regards this reversionary interest, was it property which at the time of her decease she could dispose of by that her will? I answer, No. The husband had given no assent in his lifetime to her disposing of it, and she could not sit down and make her will disposing of it as property which was within her powers of disposition at the time of her decease. Whether her will could operate upon it or not depended upon whether ex post facto the husband chose to do an additional thing, namely, to divest himself of his right to have that property, and to say, "Notwithstanding that it is mine, I agree to its being treated as if it were yours and as if you could dispose of it by your will." I do not think that falls as a matter of construction within this will.

I notice that Lord Lindley in the case, to which I have

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referred, of *In re Atkinson* (1), after the passage which I have read where he says that under the old law a probate by the husband of the will would be an assent to the will, goes on to say this: "It could not of course affect the construction, but it would have been an assent." It appears to me that what I am asked to do here by the defendants is, as matter of construction, to say that the fact that the husband subsequently assented to somebody having administration of the whole estate, which, for the purpose of my judgment, I treat as being the same thing as if he proved the will himself—that that was, for the purpose of construction, a thing which enlarged the words of disposition in his wife's will. I do not think it can have that effect. If she had, in so many words, said, "I dispose of the reversionary interest to which I am entitled expectant on the decease of my son's widow," and then the husband assented to that, to my mind the question would have been an entirely different one. It appears to me that here there has been no assent by the husband to this will as disposing of property as to which, but for his assent, there would have been an intestacy by the wife, because the form of assent excludes that, and also, as matter of construction, I think the will itself does not include it. It appears to me, therefore, that the plaintiffs are right. What they ask is a declaration that the defendants, as the wife's legal personal representatives, held this reversionary interest in trust for the husband, and now hold it in trust for the plaintiffs. I think they are entitled to that declaration. The defendants are administrators, but it is not suggested that there are any debts. The estate is clear, and in fact the defendants are here as residuary legatees claiming the fund. I hold them to be wrong. The costs must follow the event, and the defendants must pay the costs of the action.

Solicitors: *Paice & Cross; Boodle, Hatfield & Co.*

(1) [1899] 2 Ch. 1, 5.

H. C. R.

MONTEFIORE *v.* GUEDALLA.

BUCKLEY J.

1901 Jan. 11.

[1858 M. 165.]

Bankruptcy—Life Estate—Forfeiture on Alienation—"Vest in some other Person"—Act of Bankruptcy—Adjudication—Date of Vesting—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44, 54.

Where a person entitled to the receipt of dividends until he shall do or suffer to be done any act whereby the same if payable to himself would become vested in some other person, commits an act of bankruptcy which is followed by adjudication, the date upon which the dividends vest in the trustee in his bankruptcy, and are therefore forfeited, is, under the doctrine of relation back, the date of the act of bankruptcy, not the date of the adjudication.

Adjourned Summons.

Judah Guedalla died on June 8, 1858, having by his will, dated December 21, 1839, bequeathed one equal third part of his residue to trustees "upon trust to permit and suffer and authorize and empower him my said son Haim to receive the dividends interest and income of the said third part as the same shall from time to time become payable until my said son Haim shall assign charge or otherwise dispose of the said dividends interest and income or any part thereof by way of anticipation or shall do or omit to do or shall suffer to be done any act whereby the same if payable to himself would become vested in some other person or persons. And if my said son Haim shall assign charge or otherwise dispose of the said dividends interest and income or any part thereof by way of anticipation or shall do or omit to do or shall suffer to be done any act whereby the same if payable to himself would become vested in some other person or persons then do and shall during the remainder of the life of my said son Haim pay and apply the said dividends interest and income for the maintenance or otherwise for the benefit of all or any one or more exclusively of the other or others of them my said son Haim and the person or persons who under the trusts and provisions of this my will would for the time being be entitled thereto in case my said son Haim were then actually dead as

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the said trustees or trustee for the time being shall in their or his uncontrolled discretion think fit and in such manner as to them or him shall seem meet."

On July 8, 1900, Haim Guedalla committed an act of bankruptcy by not complying with a bankruptcy notice. The notice itself was not produced to the Court, but it was agreed that a bankruptcy notice was served upon him founded on a judgment which had been obtained against him on July 12, 1899; that he failed to comply with the notice within the seven days, and that the time fixed by the notice expired on July 8, 1900. On July 12 a petition was presented; on August 17 a receiving order was made; on October 1 he was adjudicated a bankrupt, and the official receiver was acting as trustee of his estate. The funds in question were invested in India 3½ per cent. Stock, of which the dividends were payable quarterly on July 5, October 5, and so on. The dividends paid on July 5, 1900, were handed over by the surviving trustee of the will to Haim Guedalla; and the question now in dispute was whether the official receiver was entitled to the dividend payable on October 5, or whether the trustee ought to apply it and future dividends according to the trusts of the gift over on alienation.

E. Ford, for the trustee. The dividend payable on October 5 vested in the official receiver, by virtue of the doctrine of relation back, on July 8. It was, therefore, forfeited as from that date, and applicable by the trustee of the will according to the provisions of the gift over on alienation. We admit that the dividend must be treated as apportionable and accruing de die in diem, and we do not claim the amount payable for July 6, 7, and 8. That belongs to the debtor, and thus to the official receiver. The remainder of the dividend is forfeited. Haim Guedalla has on July 8 done, or omitted to do, or suffered to be done, something whereby the income has become vested in the official receiver: *Ex parte Eyston*. (1) It vested in the official receiver under s. 54 of the Bankruptcy Act, 1883, and the title of the official receiver relates back to the act of bankruptcy under s. 43.

(1) (1877) 7 Ch. D. 145.

Elgood, for the persons entitled to the income under the gift over on alienation, supported the same contention.

A. H. Jessel, for the official receiver. Even after forfeiture the debtor may become entitled to some of the income under the gift over for maintenance, and an inquiry may be necessary on that point: *In re Coleman* (1); *Page* v. *Way*. (2)

The forfeiture clause only comes into operation if something is done the necessary consequence of which must be that the property vests in some other person. An act of bankruptcy does not have that effect. It is not necessarily followed by adjudication, or even by a petition. Sect. 5 only says that the Court "may" make a receiving order. The creditors are not obliged to decide in favour of adjudication. In this case the debt might have been paid after the failure to comply with the bankruptcy notice. The words "would vest" mean "must vest": they do not mean "vest in the events which have happened": *Ex parte Dawes* (3); *In re Loftus-Otway*. (4) Sect. 54 says in so many words that the property does not vest in the official receiver till adjudication. If that is not so, a trustee cannot safely pay income to a cestui que trust who has committed a possible act of bankruptcy. On adjudication, Haim Guedalla for the first time suffered something to be done which caused the property to be divested from him. That could not affect dividends already due. There cannot be a restraint on anticipation in the case of a man so as to make a subsequent act of his affect the destination of income previously accrued. The debtor was entitled to the income till the act was done which vested it in the official receiver: *In re Sartoris's Estate* (5); *In re James*. (6) On a question of mutual credits under s. 38, the doctrine of relation back has no application: *Ex parte Mant* (7), and there is no case in which the doctrine has been applied to a forfeiture clause. Sect. 44 of the Bankruptcy Act, which specifies what property is to vest in the official receiver, does not say when that is to take place, but

(1) (1888) 39 Ch. D. 443.
(2) (1840) 3 Beav. 20.
(3) (1886) 17 Q. B. D. 275, 282.
(4) [1895] 2 Ch. 235.
(5) [1892] 1 Ch. 11, 19.
(6) (1890) 62 L. T. 454.
(7) [1900] 1 Q. B. 546.

BUCKLEY J. 1901 MONTEFIORE v. GUEDALLA.

until adjudication a debtor can deal with his property. If Haim Guedalla had died after the act of bankruptcy and before adjudication, the apportioned part of the dividend would have belonged to his estate.

BUCKLEY J. stated the facts, and continued:—The question I have to determine is who is entitled to the dividend which became payable on October 5. Neither party disputes that the income is to be treated as accruing de die in diem; and the applicant does not dispute that the proportionate amounts attributable to July 6, 7, and 8 are payable to Haim Guedalla, and, therefore, to the official receiver. But as from July 8 the applicant contends that the dividends ought to be dealt with by the trustee as directed by the will during the remainder of the life of Haim Guedalla. I am of opinion that he is well founded in that contention. I have to consider whether Haim Guedalla has, and, if so, when he has, done or omitted to do, or suffered to be done, any act whereby these dividends if payable to himself would have become vested in some other person or persons. Under the Bankruptcy Act, 1883, when the adjudication was made on October 1, 1900, the result was that under s. 54 of that Act, which says that "immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee," this dividend vested in the official receiver. By s. 43, "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him"; that is, in this case, to July 8. And by s. 44, sub-s. 2 (i.), the bankrupt's property divisible amongst his creditors comprises "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

Let us, then, consider for a moment what would have been the result if the act of bankruptcy had occurred on July 8, the dividend had been payable on October 5, and the adjudication had taken place on October 10. There would then have vested

in the official receiver all the property of the bankrupt from July 8 onwards, including the dividend of October 5. By virtue of what act or omission by the debtor would the dividend of October 5 have vested in the official receiver? It appears to me that it would have been by virtue of this act or omission, namely, that he failed on July 8 to comply with the bankruptcy notice. Did he then do anything whereby the dividend of October 5 became vested in some other person or persons? I answer Yes. The act which produced this result would be not the act of the Court in adjudicating him a bankrupt, but his act to which it related back. It would be because the act was before October 5 that the dividend would vest in the official receiver.

I have in that illustration varied the dates, but the same thing appears to me to be true as to the apportioned parts of this income for each day. On the part of the official receiver it is not disputed that as from the date of the adjudication the clause in the will would take effect. It appears to me that on July 8 there had taken place an event upon which the testator has provided that during the remainder of the life of Haim Guedalla the trustees of his will shall apply the dividends for the benefit of the other persons mentioned in his will. The remainder of his life means so much of it as is subsequent to the act which he did on July 8, and everything coming to him after that date passes to the trustees of the will. Therefore, subject to the payment to the official receiver of the apportioned part of the dividend for the three days up to July 8, the remainder of the dividend and all future dividends during the life of Haim Guedalla will be applicable by the trustees of the will as provided by the will.

Solicitors: *Emanuel & Simmonds; Edward Lee; Guedalla & Cross.*

H. C. R.

BUCKLEY J.

1901

Jan. 17.

STANFORD *v.* ROBERTS.

[1884 S. 5245.]

Settled Land Act—Capital Money—Improvement—New Floor—Alterations with a view to Letting—Property already Let—Intention to Let—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21 *sub-s. iii.*, 25, 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13 *sub-s. ii.*, 15.

By s. 13, sub-s. ii., of the Settled Land Act, 1890, capital money may be applied in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let":—

Held, that the substitution for ordinary floor boards resting on joists of a block floor over concrete in order to keep dry rot out of the basement of a large house let in separate offices was an "alteration" within the sub-section.

That "reasonably necessary and proper" meant something which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do to make his house habitable; and that the new floor was reasonably necessary and proper within the sub-section.

That the jurisdiction under the sub-section to order the application of capital money in payment for an alteration depended not upon whether there was to be an immediate letting, but upon whether there was a present intention to let the premises as distinguished from an intention to occupy them; and that the new floor ought to be paid for out of capital, although substantially the whole of the house was already let.

ADJOURNED SUMMONS.

This was a summons by the plaintiff, the tenant for life of the estate, asking that so much of the funds in court to the credit of the action, capital account, as would raise the sum of 459*l.* 7*s.* might be sold, and the proceeds applied by the trustees for works already carried out and for other works required upon the premises known as Copthall House, forming part of the Stanford estate.

In May, 1900, the trustees of the estate of William Stanford, the testator in the action, purchased the leasehold premises known as Copthall House, No. 13, Copthall Avenue, in the City of London, under an order of the Court made in the action for 32,650*l.*, out of capital moneys standing in court to the credit of the action and forming part of the Stanford

settled estates. The house contained about 150 rooms and other conveniences, which were all, with the exception of one set of two rooms on the basement, let as separate sets of offices to various tenants, for terms of different lengths from monthly tenancies to a lease for forty-two years, but chiefly on yearly tenancies or for shorter terms. It was stated that changes were frequent amongst the tenants. There were thirty-three rooms in the basement of the house, the gross rentals of which amounted to 892*l.* 10*s.*

The floor of the basement became affected by dry rot, and it was found necessary on many different occasions to replace some of the boards. In July, 1900, one of the tenants in the basement complained of the state of his floor, which was injured by the dry rot and by a badly laid drain; but he agreed to continue his tenancy, which expired in September, and take two additional rooms on condition that the floor was made good in a permanent and substantial manner. This was accordingly done at a cost of 59*l.* 7*s.*, part of the amount to which the summons referred.

It was now proposed to remove the rest of the floor of the basement entirely and to replace it with a floor which would be impervious to dry rot. The tenant for life took out a summons asking that the expenses of this alteration, which, including the 59*l.* 7*s.*, would amount to 459*l.* 7*s.*, might be paid out of funds representing capital in court to the credit of the action.

An affidavit was filed by an architect and surveyor, in which he said: "In the basement of the said building there are about thirty rooms let as offices, the wooden floors of which are constructed over a bed of concrete with sleeper joists and floor boards in the ordinary way. The said floors are three or four feet below the external area, and in consequence have no ventilation, and none can be obtained without extensive structural alterations, and even then satisfactory ventilation could not be provided. The result of this state of things is that nearly all the floors of the said rooms in the basement are more or less affected with dry rot, some very badly so. I am of opinion that the proper course to adopt in the present case is to take up the whole of the floors and to substitute for them

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solid floors of concrete covered with blocks over the whole basement. This is the only radical and satisfactory cure for the conditions obtaining in the said building. If the present floors are patched up and repaired as occasion may require, the dry rot is certain to return, and there is a very considerable risk of its spreading throughout the building, which would be a very serious matter. If new floors were provided in the manner above suggested they would form a permanent improvement. The presence of dry rot in the floors makes the atmosphere of the rooms musty and unpleasant, and as the decay progresses the woodwork gives way, which not only involves risk of accident, but also causes great inconvenience and annoyance to the tenants, and renders it impossible to relet the rooms at a fair rent."

Henry Wace, for the tenant for life. A doubt has been suggested whether these works, assuming them to be "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let" within s. 13, sub-s. ii., of the Settled Land Act, 1890, come within that sub-section when substantially the whole of the building is already let.

The 59*l.* 7*s.* for work already done in order to procure a tenant is clearly within it, and it cannot be necessary to do the work piecemeal and make repeated applications of this kind. These are alterations required to make the house tenantable; they are not ordinary repairs: *In re Gaskell's Settled Estates.* (1)

They are reasonably necessary with a view to letting. The fact that at this moment all or substantially all the rooms are let is of no consequence. The house cannot be dealt with in any other way than by letting, and the tenants are constantly changing. It may be that we could not ask for the expenditure of capital on alterations where there could be no fresh tenancy for five years or more, for the tenant for life might wish to occupy the house himself at that time. But anything necessary to keep the property let is within the sub-section, provided there is a present intention of the tenant for life not to occupy

(1) [1894] 1 Ch. 485, 490.

the house himself, but to let it: *In re De Teissier's Settled Estates* (1); *In re Lord Gerard's Settled Estate.* (2)

S. O. Buckmaster, for the infant tenant in tail in remainder. These are not necessary alterations within the sub-section, they are repairs which the tenant for life is bound to do from time to time out of his own pocket. He is not entitled to ask the Court to direct that repairs should be done out of capital in such a way that they will never have to be done again. The sub-section only enlarges the powers conferred by ss. 21 sub. iii., 25 and 26 of the Settled Land Act, 1882, by making them applicable to house property. Apart from those clauses there is no jurisdiction to direct payment for repairs, except perhaps in cases of salvage. This sub-section applies only to structural alterations of a permanent character, without which it would be impossible to let the house; although no doubt the Court has a discretion, and "every case of this kind must be considered in accordance with its circumstances": *In re Gaskell's Settled Estates.* (3)

The jurisdiction depends on the question whether there is a present intention on the part of the tenant for life to procure a tenant immediately: *In re De Teissier's Settled Estates* (1); *In re Lord Gerard's Settled Estate.* (2) Those cases shew that an intention to let in six months or at any future time is not sufficient. It is impossible to say in what condition the property will then be. It may have been burnt down or taken under compulsory powers. The intention itself may vary from day to day. It is said that the tenant for life cannot occupy this house; but that might equally be said of every house except the mansion-house. For the same reasons, it is not enough to say that he means to relet it when the present tenancy expires.

E. Ff. Ball, for the trustees.

BUCKLEY J. Owing to the large application which s. 13 of the Settled Land Act, 1890, has, and the frequency of the applications under it, it appears to me that the question raised

(1) [1893] 1 Ch. 153. (2) [1893] 3 Ch. 252.
(3) [1894] 1 Ch. 485, 489.

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on this summons is of considerable importance. [His Lordship then stated the facts, and said that it was evident that the property was acquired by the trustees, not with a view to occupation by the tenant for life, but as an investment for obtaining a periodical income by the letting of the rooms, and continued :—]

The first objection taken on the part of the infant tenant in tail in remainder is that the execution of such works as these does not fall within the words "additions to or alterations in buildings" within s. 13, sub-s. ii., of the Settled Land Act, 1890. It appears to me that these works do fall within the word "alterations." By way of illustration, I will suppose that there is a house with shingle walls so constructed that, by reason of the exposed situation in which the house stands, the wet drives in through the walls and the house becomes uninhabitable. If those walls are pulled down and replaced by double brick walls that would, I think, be an alteration—a structural alteration required to make the house habitable. It seems to me that the alteration proposed in this case is of the same nature. The floor is so constructed that dry rot has got in and is likely to spread. It is an enemy which has invaded the floor and may reach the woodwork above and do serious injury. A structural alteration is required to make the house habitable. The effect of what is proposed to be done will be to substitute for what I may call the lower horizontal wall of the house a new and better one, and it will be a substantial alteration if the enemy, dry rot, is thereby excluded.

The second point is whether this is an alteration "reasonably necessary or proper" to enable this property to be let. I understand "reasonably necessary or proper" to mean something which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do. Mr. Buckmaster says that tenants will be found if the floor boards are replaced from time to time. I agree that the new floor is not absolutely necessary, but, in my opinion, it is what a reasonable and prudent owner would do if he were absolutely entitled to the property.

The third point is whether the alteration is proposed with a view "to enable this house to be let." At the present moment

all the rooms with one exception are let—substantially they are all let; therefore the alteration is not necessary or proper in order to find a tenant immediately, and in *In re De Teissier's Settled Estates* (1) Chitty J. uses this expression: "In my opinion there must be a present intention to let, if not an immediate prospect of letting, before any application under this sub-s. ii. can be properly made." And *In re Lord Gerard's Settled Estate* (2) that sentence was read or referred to by each of the Lords Justices and approved, and I need hardly say that that is entirely binding on me. But I do not think that in using that expression the learned judge meant that there must be a present intention to find a present tenant. The facts in *In re De Teissier's Settled Estates* (1) and *In re Lord Gerard's Settled Estate* (2) were that the tenant for life who desired to have the money expended on the alterations was in occupation of and intended to occupy the mansion-house, and was a person who had no intention to let. And if one looks at the interlocutory remarks of Chitty J. in *In re De Teissier's Settled Estates* (3), it will be seen that he was using the expression "a present intention to let" in contradistinction to a case where there was no intention to let. He says: "Additions and alterations such as these I usually consider proper, and allow under this sub-s. ii.; but before this sub-section can apply, there must be an actual letting in contemplation. In the present case, the tenant for life proposes to occupy the house." He is contrasting the intention to let with the intention to occupy. And he says (4): "I think it is clear that if the tenant for life is residing in the mansion-house, or contemplates residence there, as this tenant does, he cannot under this sub-section ask for capital money to be spent in making any additions to or alterations in the buildings." In *In re Lord Gerard's Settled Estate* (2), in the Court of Appeal, where the Lords Justices were agreeing with those observations, I find that interpretation of Chitty J.'s meaning adopted by something in the judgments of each of their Lordships. Lindley L.J. (5), just before

(1) [1893] 1 Ch. 153, 159.
(2) [1893] 3 Ch. 252.
(3) [1893] 1 Ch. 153, 156.
(4) Ibid. 158.
(5) [1893] 3 Ch. 260.

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reading the sentence I have quoted from the judgment of Chitty J., says: "I also agree with the view which has been taken by the Courts of first instance in other cases, that where there is no question of letting you cannot spend capital for such purposes. Here Lord Gerard is not going to let this property, he is going to inhabit it himself; and I cannot differ from the construction put upon that sub-clause ii. in *In re De Teissier's Settled Estates* (1) by Chitty J."; and then he reads the sentence. Lopes L.J. says (2): "There is the case of *In re De Teissier's Settled Estates* (1), in which Chitty J. held that the meaning of that section was this, that the thing in question must at the time be in contemplation to be let." I do not understand that to mean that it must be in contemplation to be let at the moment, but a thing to be let as distinguished from a thing to be occupied. The present Master of the Rolls says (3): "In my judgment, unless there is a present intention for a letting which does not exist in this case, sub-s. ii. does not apply." I understand him to mean a present intention to let as distinguished from an intention to occupy. I am, therefore, of opinion that these words in s. 13, sub-s. ii., are satisfied when there is a present intention to let, either at present or at a future time, as distinguished from an intention to occupy.

I am very far from saying that where a tenant for life comes and says, "This house is occupied by me at present, but I may want to let it in future, and I want to have alterations made for the purpose of making it easier to get tenants in future," and applies that capital moneys should be expended in that way, the Court will entertain the application. The jurisdiction is discretionary, and the Court will exercise the discretion with regard to all the circumstances of the particular case. The most material circumstance here is that the trustees acquired the property eight months ago for the purpose of letting, but in a condition in which this alteration was necessary or proper in order to make it fit for letting, and the Court will exercise its discretion by saying that the money may pro-

(1) [1893] 1 Ch. 153. (2) [1893] 3 Ch. 264.
(3) [1893] 3 Ch. 267.

perly be spent on the work. I therefore hold that the works done constitute an improvement within the Settled Land Acts. A sufficient part of the funds to pay for the work will be sold and the proceeds applied as asked, the amount to be ascertained in chambers.

Solicitors: *Martyn & Martyn; Attree, Johnson, & Ward, for Hunt, Currey, Nicholson & Co., Lewes.*

H. C. R.

In re FEWSTER. HERDMAN *v.* FEWSTER.

[1899 F. 247.]

Practice—Writ of Attachment—Trustee ordered to Pay into Court Money in Possession or under Control—Actual Receipt—Evidence—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54).

In an action against executors and trustees to recover the plaintiff's share of the testator's residuary estate, the master had by his certificate found that the defendants had received personal estate of the testator not specifically bequeathed to a certain amount, and had paid, or were entitled to be allowed in account, certain other sums, leaving a balance due from them, one-fourth of which was due to the plaintiff. The certificate was based upon, inter alia, an affidavit of the defendants, in which they set forth a full account of the testator's personal estate which had come to their hands or the hands of either of them, or to the hands of any person or persons by their order or the order of either of them, or for their use or the use of either of them. The account contained particulars of their receipts, including various sums of cash.

The defendants having failed to comply with an order to pay into court the amount found to be due from them to the plaintiff, a motion for attachment was made against them:—

Held, that there was no evidence of actual receipt by the defendants, and that consequently the money was not shewn to be "in their possession or under their control" within the exception to s. 4 of the Debtors Act, 1869; and no order made on the motion.

MOTION.

This was a motion for leave to issue a writ or writs of attachment against the defendants Anthony and Robert Fewster for their contempt in not paying into court to the credit of this action, pursuant to an order dated October 26, 1900, made in this action, the sum of 479*l.* 9*s.* 11*d.*, being the

JOYCE J. 1901 FEWSTER, *In re.* HERDMAN *v.* FEWSTER.

one-fourth share of the plaintiff Mary Ann Herdman of the residuary estate of the testator, John Fewster, received by the said defendants as executors and trustees of the said testator's will, and retained in their possession or under their control.

The testator by his will, dated April 26, 1872, appointed his two sons, the defendants, to be his executors, and gave all his property to them upon trust to get in and convert the same into money, and thereout to pay all his debts, funeral and testamentary expenses, and, after providing for an annuity of 40*l.* a year to be paid to his widow during her life, upon trust to divide his residuary estate amongst his four children, Mary Ann Fewster, Anthony Fewster, John Fewster, and Robert Fewster, in equal shares.

The testator died on August 24, 1872, leaving his widow and all his children named in the will him surviving.

The testator's widow died on January 17, 1874.

The testator's daughter, Mary Ann Fewster, in 1873 married Henry Herdman, and in 1899 they commenced this action against the defendants by originating summons, asking for an account and for administration of the testator's estate.

On October 26, 1899, an order was made directing that an account be taken of the personal estate and of the proceeds of sale of any real estate of the testator not specifically bequeathed or devised come to the hands of the defendants, and that an inquiry be made of what, if anything, was due to the plaintiff Mary Ann Herdman in respect of the one-fourth share in the residuary estate of the testator.

The master made his certificate on August 3, 1900, and thereby found that the defendants had received personal estate of the testator not specifically bequeathed to the amount of 2047*l.* 11*s.* 3*d.*, and had paid, or were entitled to be allowed in account thereof, sums to the amount of 129*l.* 11*s.* 7*d.*, leaving a balance due from them of 1917*l.* 19*s.* 8*d.* on that account. He further found that there was no real estate of the testator which was not specifically devised; and that, subject to the costs, charges, and expenses proper to be allowed the defendants as executors and trustees, one-fourth of the above-

mentioned balance of 1917*l.* 19*s.* 8*d.* was due to the plaintiff Mary Ann Herdman in respect of her one-fourth share in the residuary estate of the testator.

The evidence upon which the certificate was based consisted, inter alia, of an affidavit filed on February 15, 1900, by the defendants, in which they deposed that they had in an account exhibited thereto, to the best of their knowledge, information, and belief, set forth a full account of the personal estate of the testator not by him specifically bequeathed "which has come to our hands or to the hands of either of us, or to the hands of any person or persons by our order or the order of either of us, or for our use or the use of either of us." The exhibited account contained particulars of such receipts, including various sums of cash.

By the order dated October 26, 1900, the defendants were, on the application of the plaintiffs, ordered to pay into court to the credit of the action the sum of 479*l.* 9*s.* 11*d.*

The defendants having failed to comply with this order, the plaintiffs now moved to attach them for contempt.

The plaintiffs had filed and duly served upon the defendants pursuant to Order LII., r. 4, an affidavit by W. G. Davies, the plaintiffs' solicitor, in which he deposed as follows: "The said sum of 479*l.* 9*s.* 11*d.* was and is the one-fourth part of the plaintiff Mary Ann Herdman of residuary estate of the above-named testator John Fewster, deceased, received by the said defendants Anthony Fewster and Robert Fewster as the executors and trustees of the said testator's will, and retained in their possession or under their control." By their notice of motion the plaintiffs had also given notice that they intended to read upon the motion, inter alia, the master's certificate and the orders of October 26, 1899, and October 26, 1900. The defendant Anthony Fewster having filed evidence in opposition, the plaintiffs then gave him notice that they intended to read in reply the defendants' affidavit of February 15, 1900.

The defendants were both in humble circumstances, and it was stated that one of them, Robert Fewster, was without means to instruct counsel or to come to London and appear in person in opposition to the motion.

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C. Lyttelton Chubb, for the plaintiffs.

[JOYCE J. The evidence does not shew that this case is within the third exception to s. 4 of the Debtors Act, 1869.]

The master's certificate finds that the money is due from the defendants, and that is evidence that it is in their possession or under their control.

[JOYCE J. The certificate, if I am entitled to look at it, does not shew that the money has been actually received by the defendants or either of them.]

The certificate is founded on evidence.

[JOYCE J. There is evidence that the defendants are accountable, but not of actual receipt by them. The money may have been received on their behalf by an agent who never accounted.]

They are trustees, and according to their own evidence they have got in moneys which it was their duty to get in.

[JOYCE J. You must shew that it is in their possession or under their control.]

What better evidence can there be? No doubt, where a trustee can shew that the money has not come to his hands, but only to the hands of an agent, the Court will not make an order for attachment; but it has never been held that the onus lies upon the plaintiff to shew that money of which the defendant admits the receipt was in fact received by him personally. The case is covered by *Marris* v. *Ingram*. (1)

[JOYCE J. It was clear there that the defendant had personally received the money.]

Actual receipt will be assumed against a trustee in such a case as this. The defendants do not themselves suggest that they have not received the money.

W. C. Dare, for the defendant Anthony Fewster. There is no evidence that my client has received any part of the balance found to be due from the defendants. There is no evidence of actual receipt by either of them. The evidence is consistent with the whole of the money having been received by one of the two, or by an agent, to the use of one or both of them. Actual possession or control must be proved. The testator

(1) (1879) 13 Ch. D. 338.

died twenty-eight years ago. Having regard to the condition in life of the defendants, and to all the circumstances, this is not a case in which the Court will make an order for attachment. Such an order would be punitive and vindictive. The Court has a discretion under the Debtors Act, 1878.

Chubb, in reply.

Cur. adv. vult.

Jan. 19. JOYCE J. This is an application for leave to issue a writ or writs of attachment. I need not say that sending a man to prison is a very serious matter, and the Court ought to exercise its power to do this with very great care and caution, more especially in a case where it is suggested that the respondents are persons in poor circumstances and have not the means even to come to London from a distant part of the country and defend themselves. [His Lordship then stated the nature of the application, and continued:—]

If this be a case for attachment at all, it must be because it falls within the third exception to s. 4 of the Debtors Act, 1869, which is in these terms: "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." In the course of the argument I intimated that, in order to bring a case within that exception, it must be proved that the money ordered to be paid into court is or has been in the actual possession or control of the person sought to be committed. Mere constructive receipt by an agent or solicitor on his behalf who may never have accounted is not enough. To that opinion, after reflection, I must adhere. I was then referred by counsel to the master's certificate, which perhaps is not strictly evidence on this application, but by which it is found that the defendants have "received personal estate of the said testator (not specifically bequeathed) to the amount of 2047*l.* 11*s.* 3*d.*, and they have paid or are entitled to be allowed on account thereof sums to the amount of 129*l.* 11*s.* 7*d.*, leaving a balance due from them of 1917*l.* 19*s.* 8*d.* on that account." It is well known that the master's certificate in an administration action in no way distinguishes between actual and constructive receipt,

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and it does not at all follow from the above finding that there has been actual receipt. The evidence upon which the certificate is based shews that the defendants have, in an account furnished by them according to the best of their knowledge, information, and belief, "set forth a full account of the personal estate of the testator not by him specifically bequeathed, which has come to our hands or to the hands of either of us, or to the hands of any person or persons by our order or the order of either of us, or for our use or the use of either of us." That will not do. It does not appear from that evidence that the money was actually received by both or by either of the defendants, and it is perfectly consistent therewith that it may have been received on behalf of one or both of them by an agent who never accounted. But there is an affidavit made by the plaintiffs' solicitor. [His Lordship referred to the affidavit, and continued:—]

I decline to receive that as evidence of actual receipt by the defendants. The deponent may not have known exactly what happened twenty-eight years ago, and he does not give any particulars or state that there was actual receipt by the defendants or either of them. Under these circumstances I do not see my way to make the order asked for. If I were satisfied that there had been actual receipt by the defendants, I should still have had to consider whether this was a proper case for an order, having regard to the discretion which is vested in me by the Debtors Act, 1878. I decline to make any order on the motion.

Solicitors for plaintiffs: *Satchell & Chapple, for Davies & Balkwill, Newcastle-upon-Tyne.*

Solicitors for defendants: *Taylor, Willcocks & Lemon, for D. H. C. Balleny, Consett.*

G. A. S.

In re MELBOURNE BREWERY AND DISTILLERY.

WRIGHT J.

1900

Dec. 19.

Company—Winding-up—Petition—Creditor with Debt payable at a Future Date—Debenture Stockholder's Petition—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80, 82.

A debenture stockholder of a company who has no present claim for principal or interest is not a creditor in such a sense as to be entitled to petition for a winding-up order.

In re Australian Joint Stock Bank, W. N. (1897) 48, distinguished.

The effect of provisions in a debenture stock trust deed as to the security being enforceable immediately on a breach of covenant by the company considered.

THE Melbourne Brewery and Distillery, Limited, was registered on July 27, 1894, with a capital of 160,000*l.* in 10,000 preference shares, and 6000 ordinary shares of 10*l.* each, and shares to the amount of 131,130*l.* were issued and credited as fully paid up.

The company between 1895 and 1898 raised or secured the repayment of money by the issue of 170,000*l.* 5*l.* per cent. debenture stock. The stock was secured by a principal trust deed dated September 17, 1895, and a supplemental trust deed dated August 6, 1896, and by debentures issued to the trustees of the deeds, and was evidenced by certificates issued to the stockholders. By the principal deed 150,000*l.* stock and the interest thereon were secured by a specific mortgage of the company's freehold properties and fixed plant and by a floating charge on the company's assets. The stock was redeemable after the year 1910 at 5 per cent. premium. The principal deed also provided as follows:—

"7. The security hereby constituted shall be enforceable in each and every of the events following:—

"(1.) If any default be made in the redemption of or the payment of interest on the stock for the period of three months after such redemption or interest ought to have been effected or paid.

"(2.) If any order shall be made by any competent Court or

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(subject to the provision hereinafter contained relating to a sale of the company's undertaking or a reconstruction of the company) an effective resolution of the company shall be passed for the winding up of the company.

"(3.) If a distress or execution be respectively levied or sued out upon or against any of the chattels or property of the company or its assigns.

"(4.) If the company or its assigns commit a breach of any covenant herein contained.

"21. The company will during the continuance of this security carry on and conduct the business of the company to the greatest possible advantage, and will keep proper books of account, and therein make true and perfect entries of all dealings and transactions of or in relation to the said business, and certified copies of the accounts and all documents relating to the affairs of the company shall be kept at the registered office of the company, or other place or places in England, and the same shall at all reasonable times be open for the inspection of the trustees or trustee and such persons or person as they shall from time to time in writing for that purpose appoint. . . ."

"32. The company covenants with the trustees or trustee to do all such lawful assurances and things as may by local law be necessary for further or more perfectly assuring to the trustees or trustee the mortgaged premises or any part thereof.

"33. The company hereby covenants with the trustees or trustee that the company will duly perform and observe the obligations hereby imposed upon it.

"35. The company hereby covenants with the trustees or trustee that the company will pay to the stockholders the amounts respectively payable to them for principal and interest respectively as and when the same become due and payable by the company to the stockholders respectively, and will observe and perform the several conditions, agreements, and provisions set forth in the 3rd schedule hereto."

. The supplemental trust deed increased the amount of the debenture stock to 170,000*l.*, and the trustees, with the consent of the stockholders, waived all interest on the original 150,000*l.* stock which had accrued down to July 1, 1896, and an issue

of 20,000*l.* prior lien bonds was placed in priority to the whole of the stock.

The debentures stated that the amounts secured were repayable on December 31, 1994, and that the debentures were issued subject to the conditions indorsed thereon. Clause 6 of the conditions was as follows :—

"The company or its assigns may, without paying off any of the debentures of this issue, at any time on or after the 31st day of December, 1910, give notice to the registered holder of this debenture of its intention to pay off the moneys secured by this debenture or some part thereof, not being less than 15,000*l.*, and upon the expiration of six calendar months from such notice being given the principal moneys hereby secured to the extent named in the said notice of intention shall become payable."

Interest on the stock was payable to the stockholders on each January 1 and July 1.

G. B. Wieland held 2270*l.* stock, and most of the rest of the stock was held by the London Bank of Australia, Limited (the promoter of the company), or its nominees. 15,000*l.* stock was issued as a security for a sum of 10,000*l.* due from the company to some of its creditors.

On January 1, 1896, a half-year's interest on his stock became due to Wieland, and the company made default in the payment of it. Relying on this default, Wieland, in February, 1896, presented a winding-up petition against the company, but on August 11, 1896—that is to say, the day before the date of the supplemental deed—withdrew his petition upon certain terms, which included the payment by the company to him of the interest due to him. The prior lien bonds were throughout held by the London Bank of Australia, Limited, or its nominees.

In 1900 Wieland presented another winding-up petition against the company. In this he alleged that the indebtedness of the company was steadily increasing, and that it had only been enabled to pay the interest on the prior lien bonds and the stock (including the interest due on July 1, 1900, on the petitioner's stock) by borrowing the amount required to pay the interest from the London Bank of Australia, Limited ; that

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payment of the interest had been made by the directors of the company with the view solely to prevent the petitioner and the other holders of stock upon which the interest was paid from enforcing their securities, and that the directors intended with the same object and with the same means to continue such payment; and (paragraph 18) that the trading of the company had up to that time been unsuccessful, and that it was impossible that the company should be carried on at a profit; that the company was not in fact carrying on its business to the best advantage; and that default had been made by the company in payment of the interest on part of the said stock for a period of three months after such interest ought to have been paid. The petitioner accordingly submitted that in the circumstances the principal of his said debenture stock had become and was due and payable to him, that the company was insolvent and unable to pay its debts, and that it was just and equitable that the company should be wound up by the Court.

Alexander, *Q.C.*, and *Austen-Cartmell*, for the petitioner.

Hon. E. C. Macnaghten, *Q.C.*, and *R. J. Parker*, for the company, took the preliminary objection that the petition was demurrable, inasmuch as the stock held by the petitioner was not repayable until 1994; that he had been paid all interest due to him, and was not a creditor entitled to present a winding-up petition.

[They were stopped.]

Alexander, *Q.C.*, and *Austen-Cartmell*. A creditor with a debt payable in futuro may in certain circumstances petition for a winding-up order: Palmer's Company Precedents, 8th ed. Pt. II. p. 52; *In re Australian Joint Stock Bank*. (1)

If a creditor in the position of the petitioner is unable to petition until his debt becomes actually due and payable, the property of the company may all disappear before he is able to ask the Court to interfere. Moreover, under the original trust deed, the principal has become due, for there has been a default by the company in the payment of interest on some of the

(1) W. N. (1897) 48.

debentures held by persons other than the petitioner. The company has also broken its covenant to carry on its business to the greatest possible advantage. The petitioner has, therefore, a debt payable in præsenti.

WRIGHT J. I need not trouble you, Mr. Macnaghten.

The question involved in this case is one of importance. If persons could petition to wind up a company because they were holders of something which would give them a right to obtain principal moneys in a century's time, it might be awkward. In bankruptcy we are familiar with the principle that if a person has committed an act of bankruptcy a petition in bankruptcy may be presented against him under certain circumstances by a person whose claim is not yet ripe, as, for instance, on a bill of exchange; but I do not think that even in bankruptcy the cases go so far as this petitioner wishes me to go. No interest is in arrear, either to him or to any other debenture stockholder. The principal—if the word "principal" can be properly used—of his debenture stock cannot be claimed by him, except on certain defaults by the company, until the year 1994, although the company itself has the option of redeeming stock—that is a better phrase than "paying off the principal of it"—in 1910. Apart from the conditions as to defaults by the company, it appears to me to be plain that a stockholder cannot petition in respect of a right to be redeemed in 100 years' time, or in respect of future interest which has not yet accrued due—interest for years which are yet to come.

I do not think any case has ever gone so far as that, either in bankruptcy or in company law.

I now come to a part of the case where there may be some difficulty. Clause 7 of the original trust deed provides that the securities shall be enforceable in each and any of certain events, one of which is default in payment of interest for three months, or if the company commits a breach of any covenant contained in the deed. As regards the default in payment of interest, it appears by the petition that there was a time in 1896 when there was a default in the payment of interest such as would have entitled the stockholder to treat the principal as

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payable if he had thought fit to do so; but in August of that year this petitioner presented a petition based on that very default, and the dispute between him and the company was put an end to and settled by a compromise. It seems to me that, on that compromise being arranged, the petitioner's right in respect of that default entirely ceased. And ever since that time he has regularly been paid and accepted the interest as it fell due from time to time, and, so far as can be gathered from the petition, so have all the other debenture stockholders. I cannot conceive that under those circumstances any of them can make use of a default three or four years old for the purpose of claiming to be entitled to have the principal of the debenture stock redeemed.

The other point is a singular one. The same paragraph 7 of the deed, sub-clause 4, makes the security enforceable if the company commits a breach of any covenant therein contained. It is said that the petitioner brings his case within that clause because he alleges in his petition that the company is not in fact carrying on its business to the best advantage.

Now, I should say, first of all, that there was not a sufficient allegation of a default of that kind, and I might order that part of the petition to be struck out unless the petitioner would amend it in such a way as to make a specific and definite case; but I do not rely mainly on that. It seems to me that on the construction of this deed, paragraph 7, sub-cl. 4, does not refer to a matter of this kind at all. In my judgment it would be hardly possible to so construe this deed as to hold that the security should become enforceable by a particular stockholder upon a breach of any one of these most trifling obligations which the company has brought itself under by this deed. It has undertaken a great variety of obligations of various degrees of importance, and I do not think it could possibly be supposed that the security was to become enforceable by any stockholder whenever any one of the provisions of the deed could be shewn to have been disregarded. It seems to me that paragraph 7, sub-cl. 4, where it speaks of "covenant," is referring to things which in the deed itself are called covenants. When I turn to paragraph 12 of the deed I find four consecutive

covenants of very great importance—covenants expressly so called, and beginning with the words, "The company hereby covenants with the trustees or trustee." Those are all covenants as to matters of importance, and they are covenants not with the stockholders but with the trustees; and I do not think that the matter suggested in the 18th paragraph of the petition is in itself enough to make the 7th paragraph, sub-cl. 4, attach, so far as the matters disclosed in the petition enable me to judge. I do not say how the case might have stood if the trustees had been parties to the petition, or had elected to treat the company as in default.

The only other matter that I have to notice is *In re Australian Joint Stock Bank* (1), decided by Vaughan Williams J. In that case there was a petition by a creditor whose debt was at that time not payable, and a winding-up order seems to have been made upon it; but then he was a creditor—he was a creditor in the fullest sense, but payment of his debt was deferred under a scheme. Therefore, his debt had been due and payable apparently, as I understand the case, and was due and payable, although actual payment of it was suspended under the provisions of the scheme. He was none the less a creditor, if the debt was due and had become payable, because payment had been suspended for a time. But here, in the view that I take, the petitioner is not a creditor at all, certainly not in respect of future interest, and with regard to the principal, it seems to me that any right he once had has been waived. I think, therefore, the petition must be dismissed with costs.

Solicitors for petitioner: *Deacon, Gibson, Medcalf & Marriott.*

Solicitors for company and opposing debenture stockholders: *Hollams, Sons, Coward & Hawksley.*

(1) W. N. (1897) 48.

F. E.

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Jan. 16, 17.

BATH *v.* BATH.

[1860 B. 98.]

Practice—Fund in Court—Payment out to Person not entitled—Non-disclosure of facts by Applicant and his Solicitor—Absence of Stop Order—Commissioners of Treasury—Liability to replace Fund—Default of Paymaster—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44), *s.* 5.

If a person becoming interested in a fund in court standing to an account in the name of another does not obtain any stop order against the fund, and the fund is subsequently paid out in disregard of his interest to a person apparently, but not in fact, entitled to it, the Paymaster-General is not guilty of default within the meaning of s. 5 of the Court of Chancery (Funds) Act, 1872, so as to make the Treasury liable to make good the fund out of the Consolidated Fund.

So *held*, on the authority of the decision of Earl Cairns L.C., in the unreported case of *Jones* v. *Jones*, post, p. 464.

PETITION.

Land in which the plaintiff, John Smith Bath, then an infant, was interested, was taken by the South Eastern Railway Company under their compulsory powers, and the purchase-money was paid into court under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). Pursuant to an order made in this action the money was invested in Consols to the credit of the action, "The account of the shares of the infant plaintiff John Smith Bath and the infant defendant Frederick Caleb Bath, as co-heirs in gavelkind of the intestate John Bath, in the proceeds of real estate taken by the South Eastern Railway Company."

The plaintiff attained the age of twenty-one in 1879, and he thereupon became absolutely entitled to a moiety of the fund.

The plaintiff was on January 14, 1892, adjudicated bankrupt by an order of the county court at Rochester. In 1893 he prepared a scheme for the arrangement of his affairs and the annulment of his bankruptcy. The scheme was that his debts should be paid in full, and that the costs of the proceedings, the remuneration of the trustee, and the fees of the official receiver and the Board of Trade should be paid, and that the money to answer such payments should be paid into court by

the Creditors Assets Company, Limited, and upon such payment an order of the Court should be made vesting "all my property" in the company. The company agreed to provide money to obtain the confirmation of this scheme, and on April 20, 1893, an agreement was entered into between the plaintiff and the company, which provided that in the event of the scheme being confirmed the company should, when and as soon as it should have provided the moneys necessary to carry out the scheme, and "the property set forth in the 2nd schedule" thereto should have been duly vested in the company by an order of the Court, proceed to manage, develop, realize, or dispose of "the said property as described in the 2nd schedule" thereto, and which was thereinafter called "the property," in such manner as the company in their discretion should think fit, subject to certain provisions thereinafter specified. When the company should have been paid the full amount of the moneys due to them under the agreement, and certain profits, the plaintiff was to be entitled to a conveyance from the company for his own benefit of such part of the property as was then unrealized.

The scheme was set out in the 1st schedule to this agreement, and the 2nd schedule contained particulars of certain freehold and leasehold property. The scheme was approved by the Court, and the company paid into court the sums required, and on July 11, 1893, an order was made, upon the application of the debtor, rescinding and annulling the receiving order against him and the subsequent order of adjudication, and directing "that all the property of the above-named debtor be and that the same henceforth shall become vested in the Creditors Assets Company, Limited, subject to such mortgages and equities of redemption as are now subsisting therein."

The solicitor who acted in the preparation of the scheme and the obtaining of the order was Mr. Charles Parr, who was then in the employment of Messrs. May, Sykes & Batten, solicitors. At that time neither the plaintiff, nor Mr. Parr, nor his employers were aware of the existence of the fund in court, and no information as to it was given to the company, and consequently no notice of the vesting order was given to the Paymaster-General.

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In 1895 the plaintiff, through an intimation from a dormant funds office, became aware that he was entitled to certain funds in court.

On February 29, 1896, the fund in court to which the plaintiff had become entitled consisted of 471*l.* 9*s.* 3*d.* cash and 989*l.* 18*s.* new Consols, and an order was upon that day made in chambers for payment and transfer of the fund to the plaintiff. In his affidavit in support of the application the plaintiff stated that he was not aware of any right in any other person, or of any claim made by any other person, to the cash or Consols, and that he had not created any charge or incumbrance thereon.

The cash and Consols were paid and transferred to the plaintiff in pursuance of the order.

Mr. Parr acted as solicitor for the plaintiff on the obtaining of the order.

The Creditors Assets Company, Limited, presented this petition, alleging that Parr and the plaintiff had concealed the facts from the judge, and asking that the order of February 29, 1896, might be discharged and an order made directing that the Paymaster-General or the Treasury Commissioners should replace to the credit of the action the 471*l.* 9*s.* 3*d.* cash and 989*l.* 18*s.* Consols, together with all dividends which had accrued due thereon since February 29, 1896, and for the distribution of the said funds in cash and Consols as if such funds were then in court, or that such other order might be made in the matter, not only as to the funds, but as to the plaintiff and his solicitor, as to the Court might seem just. The petition was served upon Parr, the plaintiff, and also, by the direction of the judge, upon the Paymaster-General and the Treasury Commissioners.

The contention of the plaintiff and his solicitor raised by their affidavits was that the fund in court was not in contemplation when the scheme was made, that it was distinctly understood that the only property to be affected by it was to be that specified in the schedule to the agreement of April 20, 1893, and that if any other property could be held to vest in the company under the scheme it could only be held by them as bare trustees for the plaintiff.

Upon the construction of the vesting order and the agree-

ment, His Lordship came to the conclusion that under the scheme as confirmed by the order, everything, whether known or unknown, which by virtue of the bankruptcy was vested in the trustee for the benefit of the creditors, became vested in the petitioners, and he could not understand how the plaintiff and his solicitor had not recognised that there was a question whether the petitioners had not some interest, whether beneficial, or as trustees, in the fund. His Lordship observed that the order of February 29, 1896, was rightly made upon the facts then before the Court, but that the whole of the facts ought to have been, but were not, brought to the attention of the Court.

The question of the liability of the various respondents was accordingly raised.

Renshaw, *Q.C.*, and *Pollard*, for the petitioners. The fund having been paid away to persons who were not entitled to receive it, the case is within s. 5 of the Court of Chancery (Funds) Act, 1872, and the Consolidated Fund of the United Kingdom is liable to make good the amount to the petitioners, and an order to that effect ought to be made: *Marsh* v. *Joseph* (1); *Slater* v. *Slater*. (2) As the petitioners were not aware of the existence of the fund, it was impossible for them to obtain a stop order, and no negligence can be imputed to them for failing to do so. They did all they could do by getting a vesting order. A stop order is only a caveat; it does not confer any right. It does not, for instance, give priority as against equitable execution by the appointment of a receiver: *In re Galland*. (3)

Sir R. B. Finlay, *A.-G.*, and *R. J. Parker*, for the Paymaster-General and the Commissioners to the Treasury. The absence of a stop order is fatal to the petitioners' claim against the Treasury. That was decided in the year 1879 in *Jones* v. *Jones* (4), an unreported case, which was heard before Earl Cairns L.C. in his private room, and in which, after argument by counsel, he reserved his judgment, and

(1) [1897] 1 Ch. 213.
(2) [1897] 1 Ch. 222, n.
(3) W. N. (1886) 96.
(4) Post, p. 464.

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subsequently wrote and handed down to the parties his considered judgment. That judgment has been obtained from the Chancery Registrar's chambers, and is, with the petition upon which it was given, now in court. (1)

(1) Earl Cairns L.C. April 2, 1879.

JONES *v.* JONES.

Petition in the action and in the matter of the Court of Chancery (Funds) Act, 1872, asking for the certificate of the Lord Chancellor to the Treasury Commissioners that the Paymaster-General had been guilty of default in allowing a share of certain funds in court to the credit of a particular account in the action to be sold and transferred without notice to the petitioner Fielding, in disregard of the directions contained in a certain order in the action, and that such sum as represented the share in question, and the costs of the petitioners, ought to be paid out of the Consolidated Fund to the credit of the Paymaster-General; and that the sum so certified might be paid by the Paymaster-General to the petitioner Gibbons.

The facts are stated in the judgment of the Lord Chancellor, which was as follows:—The facts under which this application is made to me do not appear very perfectly on the petition; but I will state them as I understand them to be after hearing the admissions agreed to between the petitioner and the counsel for the Treasury.

The estate of a testator named Lacy was being administered in the Court of Chancery. In a part of the estate there was an intestacy. Subject to the life interest of a Mrs. Hutchison, 1278*l.* 9*s.* 4*d.* was carried over to a separate account representing this part of the estate, and it was entitled "The account of the share of the testator's residuary estate given to Mrs. Hutchison for life."

This fund, subject to Mrs. Hutchison's life interest, belonged to Elizabeth Harriet Lacy, the sole next of kin of the testator. She died in 1853, and her administrators were James Samuel Jones and John Des Champs Jones. Her next of kin were eight in number, and John Des Champs Jones was one of the eight.

John Des Champs Jones by indenture of February 28, 1862, mortgaged his eighth share to the petitioner Fielding with a power of sale, and on March 24, 1862, the petitioner Fielding obtained the usual stop order on the fund.

About eight years afterwards, the petitioner Fielding, under the power of sale in the mortgage, sold this share of John Des Champs Jones to the petitioner Gibbons, and assigned it by an indenture dated July 16, 1870, and from that time the petitioner Fielding ceased to have any interest in the fund.

Gibbons did not obtain any stop order on the fund.

Then came the Court of Chancery (Funds) Act, 1872. The office of the Accountant-General was abolished, and it was enacted that Her Majesty's Paymaster-General should perform all the duties and exercise all the powers and authorities which were performed by or vested in or capable of being exercised by the Accountant-General. The funds of the Court of Chancery were taken over by the State, and the 5th section of the Act provided that the Consolidated Fund should be liable to make good to the authorities of the court all money in court, and that if the Lord Chancellor should certify to

Warrington, Q.C., and *Muir Mackenzie*, for the plaintiff, admitted that in view of the course which the proceedings had taken, they could not dispute his liability.

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the Treasury in writing that the Paymaster-General had failed to pay any money into court, or transfer or deliver any securities into court required by any order of the Court to be paid, transferred, or delivered from his account, or should have been guilty of any default with respect to such money or securities, the Treasury should pay out of the Consolidated Fund the sum certified to be required to pay the money or release the securities, or make good such default.

It is under this section that the present application is made to me. It is said that the Paymaster-General has been guilty of a default with respect to the share of John Des Champs Jones in the fund in question. This default is attempted to be made out in the following way: Mrs. Hutchison, the tenant for life, died on the 20th day of June, 1872. John Des Champs Jones had died previously. It appears that in 1862, when the petitioner Fielding obtained his stop order, a note of the stop order was made in the usual way against the account in question in the book at that time in use in the office of the Accountant-General in which the account of that fund was contained. In process of time, but before the office of Accountant-General was abolished, this book was filled up and ceased to be used, and the account of the fund in question was carried into a new book in which it was from that time kept. In carrying it into the new book, the notice of the stop order was inadvertently omitted, and in the new book it stood without any notice of the stop order. In February, 1873, after the duties of the Paymaster-General had commenced, those who were then the personal representatives of Elizabeth Harriet Lacy applied to the Court of Chancery to distribute the fund. A certificate of the fund was given in the usual way by the Paymaster-General, and no mention was made in the certificate of any stop order. The Court thereupon ordered the fund to be paid to the personal representative of Elizabeth Harriet Lacy.

It is said upon this state of facts that I should certify that the Paymaster-General has been guilty of default with respect to the money. It is said that he ought to have known of the stop order, and ought to have taken care that the fund was not paid out without notice having been given according to the stop order.

I should have very great difficulty in holding that the Paymaster-General had under these circumstances been "guilty of default." These words appear to me to point to some act of misfeasance or carelessness attributable to the Paymaster-General himself, or to those under his direction and superintendence at the time when the act occurs. I incline to think that the negligence in this case occurred in the time of the Accountant-General, when the account of the fund was carried into the new book, but it is not necessary that I should decide this, and I do not desire to do more than to intimate a doubt with regard to it.

But it seems to me impossible upon another ground that I can give the certificate which the petitioners ask for. The stop order was obtained by the petitioner Fielding, and it required notice to be given to Fielding. But

KEKEWICH J. 1901 BATH v. BATH.

P. O. Lawrence, Q.C., *Micklem, Q.C.*, and *Harman*, for Parr, made a similar admission.

KEKEWICH J. made an order dismissing the petition against the Paymaster-General and the Commissioners of the Treasury with costs to be paid by the petitioners, declaring that the petitioners were entitled, subject to their obligation to bring the same into account as moneys subject to the agreement of April 20, 1893, to be paid by each of them, the plaintiff and Parr, the amount of the cash and the value of the Consols at the average market price of the day of the transfer out with interest at 4 per cent. per annum from that day until payment; and he ordered that the plaintiff and Parr should pay the petitioners' taxed costs, and also pay to the petitioners the taxed costs of the Paymaster-General and the Commissioners of the Treasury.

Solicitors: *Ranger, Burton & Frost; The Solicitor to the Treasury; Payne, Shaw-Mackenzie & Lake; Armitage & Strouts.*

Fielding ceased, as I have said, in 1870 to have any interest in the fund, and he is not in any way damnified by the fund having been paid to the representative of Elizabeth Harriet Lacy. On the other hand, Gibbons, who is interested in the fund, never obtained any stop order, and never required any notice to be given to him, and he, therefore, cannot complain of any default as against him on the part of the Paymaster-General.

It was indeed stated before me by the petitioners, and apparently not denied, that the solicitor for Fielding was also solicitor for Gibbons, and it was said that if notice had been given to Fielding his solicitor would have known of it, and would have communicated the notice to Gibbons. But this was an accident which might or might not have led to the result supposed, and which cannot give to either of the petitioners any right which they would not otherwise have had. The security provided by the Court was a security for Fielding only, and it is necessary, in my opinion, that Fielding should be able to shew me that he, Fielding, has been in some way injured by the manner in which the Court has dealt with the fund. I must, therefore, decline to make an order upon the petition.

Solicitors: *Wood, Latham & Bigg; Hare & Fell, for the Solicitor to the Treasury.*

C. C. M. D.

In re KERLY, SON & VERDEN.

C. A.
1900
FARWELL J.
Dec. 7.
C. A.
1901
Jan. 14, 15.

Procedure—Solicitor—Writ of Summons—Service, Acceptance of—Entering Appearance — Undertaking — Proceeding with Action — Delay — Writ enforceable after Twelve Months—Attachment—Application, Form of—Rules of the Supreme Court, 1883, *Order* VIII., *r.* 1; *Order* IX., *r.* 1; *Order* XII., *r.* 18.

Where, with the authority of the defendant in an action, his solicitor accepts service of the writ on his behalf and gives a written undertaking, under Rules of the Supreme Court, 1883, Order IX., r. 1, to "enter an appearance in due course," that undertaking is unconditional and must be performed forthwith, and, at the instance of the plaintiff, it can be enforced by attachment of the solicitor under Order XII., r. 18.

The solicitors to the defendant in an action accepted, by his authority, service of the writ on his behalf, and at the same time gave the plaintiff's solicitor a written undertaking to enter an appearance in due course, but, on account of a proposal by the defendant for settlement, the time for appearance was extended for two months. No appearance was ever entered, and no step was taken in the action for a further period of eighteen months, when the plaintiff, desiring to proceed, required the defendant's solicitors to enter appearance pursuant to their undertaking, which they declined to do, on the ground that their clients, considering the action at an end, had directed them not to enter appearance.

Upon an application by the plaintiff, under Order XII., r. 18, to attach the solicitors for breach of their undertaking, the Court of Appeal, affirming Farwell J., ordered the solicitors to enter appearance forthwith, with liberty to the plaintiff to renew his application in case of their default.

An original writ of summons, notwithstanding the expiration of the twelve months limited by Order VIII., r. 1, and even though not renewed under that rule, still continues effectual for all purposes except that of service, the limit of time applying to service only.

An application by a plaintiff under Order XII., r. 18, to enforce by attachment a written undertaking by the defendant's solicitor to enter an appearance to the writ, should be made and intituled, not in the action, but in the matter of the solicitor, by virtue of the jurisdiction of the Court over its officers.

Per Farwell J.: A written undertaking by a solicitor, acting on the authority of a defendant, to enter an appearance to the writ, constitutes a contract on the part of the defendant by the solicitor or his agent to enter appearance, and differs from an ordinary contract only in that it may be enforced against the solicitor himself by attachment at any time within six years, provided the action continues effective.

On February 23, 1899, a writ of summons was issued in an action brought by a Mrs. Anderson, as executrix of her late

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husband, against two defendants, Tarbutt and Quentin, for (amongst other relief) an account of net profits alleged to have been made by the defendants on the sale by them of certain property to a South African Gold Company, the plaintiff alleging that her late husband had an interest in such profits. On the following day, February 24, the plaintiff's solicitors produced the writ to the defendants' solicitors, Messrs. Kerly, Son & Verden, who, acting by the defendants' authority, indorsed it as follows: "We accept service for the defendants Tarbutt and Quentin, and will enter an appearance in due course. Kerly, Son & Verden. 24.2.99." Before, however, any appearance was entered, a correspondence commenced on the same day, February 24, between the solicitors for the parties with a view to a settlement, the defendants' solicitors offering by letter of that date to pay the plaintiff 250*l.* in full settlement of all claims. In reply, on the following day, the plaintiff's solicitors wrote that they were prepared to stay proceedings pending the receipt of further instructions from their client, who was in Johannesburg, and proposed that the offer of 250*l.* should remain good for two months, to cover one post; to which the defendants' solicitors replied that under the circumstances they would delay entering appearance. On March 1, 1899, the defendants' solicitors wrote that they had received instructions from their clients to agree to a stay of proceedings pending the receipt by the plaintiff's solicitors of instructions from their client in Johannesburg; the offer to pay 250*l.* to remain open for two months from February 26: the letter also asked the plaintiff's solicitors to send formal consent to extend the time for appearance till April 30, which the plaintiff's solicitors did by letter on March 2.

Owing mainly to the disturbed condition of South Africa, the eventual outbreak of the war, and the consequent difficulty of obtaining information, either in Johannesburg or elsewhere, respecting the affairs of the plaintiff's late husband, whose estate was being administered there, nothing further was done in the action until October 24, 1900, on which day the plaintiff's solicitors, who had in the meantime been corresponding with solicitors in Johannesburg who were advising the plaintiff

there, wrote to the defendants' solicitors stating that they were now instructed to decline the offer made on behalf of the defendants and to proceed with the action as quickly as possible, and requesting them to "enter an appearance pursuant to your undertaking, without delay." The defendants' solicitors replied that their clients declined to instruct them to enter appearance, and therefore they could not do so.

Thereupon the plaintiff's solicitors served the defendants' solicitors, under Rules of the Supreme Court, 1883, Order XII., r. 18, with a notice of motion on behalf of the plaintiff, intituled, not in the action, but "In the matter of Alexander Kerly" and others, "(trading as Kerly, Son & Verden), solicitors of the Supreme Court," for leave to issue a writ or writs of attachment against the firm and the individual members of it for their default in entering an appearance pursuant to their undertaking.

In an affidavit filed in opposition to the motion by the senior member of the firm of Messrs. Kerly, Son & Verden, who had the personal conduct of the matter, he stated that after the receipt of the letter of October 24, 1900, he applied to the defendants for their instructions as to entering appearances for them, when they informed him that, in view of the long delay on the part of the plaintiff, they regarded the action as at an end, and directed him not to enter appearance; that since the service of the notice of motion he had again applied to the defendants for instructions, and that at his request they had instructed him to do what the Court thought fit under the circumstances to direct; and that, having regard to the long delay on the part of the plaintiff, his firm believed they would not now be justified in entering appearances for the defendants under their original instructions in February, 1899, but desired to submit themselves to the direction of the Court in the matter. It was admitted on all sides that there had been no unfair or improper conduct whatever on the part of the defendants' solicitors in refusing, under the circumstances, to perform their undertaking, and it was stated that their clients had agreed to indemnify them against costs, should the Court be of opinion that the undertaking should have been performed,

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and to give them the necessary authority for entering appearance. As a reason for the plaintiff desiring to continue her present action instead of commencing a new one, it was stated that a new writ might be met by pleading the Statute of Limitations, which could not be effectually done in the present action.

G. I. F. C.

The motion was heard before Farwell J. on December 7, 1900.

Upjohn, Q.C., and *F. Gore-Browne*, for the plaintiff. The undertaking to enter an appearance is really a contract. It is said that the plaintiff cannot now enforce it, having regard to the delay that has taken place. The respondents were, however, in default in the performance of their contractual duty; the plaintiff has only postponed the enforcement of her contractual rights. The respondents have failed to perform the contract which they entered into on behalf of the defendants, and which can be enforced within the period of six years. The real object of the defendants in refusing to have the appearance entered is that the delay, which took place by mutual consent, may have the effect of altering the rights of the parties by forcing the plaintiff to bring a fresh action to which the Statute of Limitations might be pleaded.

C. E. Jenkins, Q.C., and *D. M. Kerly*, for the respondents. There is now no writ to which an appearance can be entered: Rules of the Supreme Court, 1883, Order VIII., r. 1. (1) The

(1) The following Rules of the Supreme Court, 1883, were referred to:—

Order VIII., r. 1: "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ . . . . and a writ of summons so renewed shall remain in force and be

original writ has not been renewed and is no longer in force. It is said that the undertaking is a contract; but if so the plaintiff who now seeks performance is not in a position to fulfil her part of it. The parties have allowed Order VIII., r. 1, to come into force, the result being that there is now no writ in force. Some limit must be placed upon the period during which the undertaking is to be binding. If the writ is once served, no doubt the position is altered, but under Order IX., r. 1, no service is required where, as here, an undertaking is given. Under the circumstances of this case the defendants' solicitors are relieved from the performance of the undertaking. If they refused to enter the appearance, this is not a case in which the Court would issue a writ of attachment against them. The reasonable limit of time within which the undertaking is enforceable is the period of one year, within which the writ remains good for service.

FARWELL J. This is in form a motion that a writ of attachment may issue against a firm of solicitors, but although put in that form, there is no sort of imputation against the solicitors. The respondents' first point is that there is no writ now to which he can appear. For that Order VIII., r. 1, is relied on. [His Lordship read the rule, and continued:—] In my opinion that means that the original writ of summons shall be in force for the purpose of service for twelve months and no more, not that the writ loses all its efficacy altogether for every purpose; e.g., if the writ be issued and appearance be entered, and the parties arrange, or without arrangement, allow the matter to drop for eighteen months, in my opinion the writ still remains and is efficacious, and the statement of

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available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Order IX., r. 1: "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance."

Order XII., r. 18: "A solicitor not entering an appearance or putting in bail, or paying money into court in lieu of bail in an Admiralty action in rem, in pursuance of his written undertaking so to do, shall be liable to an attachment."

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Farwell J.

claim may go on subject, of course, to the provisions of Order LXIV., r. 13. The first point, therefore, in my opinion is not a sound one.

Then the real question that I have to consider is, What is the effect of the undertaking to enter an appearance? Order IX., r. 1, provides that no service of a writ shall be required when the defendant by his solicitor undertakes in writing to accept service and enter an appearance. That rule was inserted because many persons do not like being personally served, and it was accordingly provided that their solicitors may (being duly authorized) undertake to accept service for them, that is to say, as their agents, and enter into a contract to appear. It has this difference, and so far as I can see this difference only, from an ordinary contract, namely, that the agent can be imprisoned, if the Court thinks fit, for not performing his portion of that contract. The contract is the contract of the defendant; the solicitor is the agent duly authorized to make the contract. It appears to me to follow that the contract remains a binding contract, and the only limitation I can see is that suggested by the plaintiff's counsel —six years. It was suggested that there was some sort of analogy to be derived from the necessity for renewal of the writ within twelve months, and that that ought to be the limit of time—one year and not six. I cannot see any reason for applying such a rule as that to what is, in my judgment, a mere contract. The defendants contract to enter the appearance, and I see no reason why they should not do it. It is suggested that the clients might say to their solicitors, "We no longer choose to employ you; you must not enter an appearance for us." The answer is that the defendants did at the time authorize them to act as their solicitors, and as their solicitors to undertake to enter an appearance, and they cannot subject their agent, whom they have authorized to enter an appearance, to imprisonment because they now say, "True, we gave you that authority to enter into a contract, but we now refuse to allow you to carry it out, so far as you are concerned, although you will be imprisoned if you do not." If the defendants in this case had taken the course, which I am glad

to find they did not, of refusing to allow the solicitors to enter the appearance, it would be ineffectual, because in my judgment the solicitors would be bound to enter an appearance, and the clients would be bound by the authority they had already given, and the contract they had already entered into to appear. The real answer on the question of delay is that each party was equally in a position to put an end to it. If after April 30 the defendants had chosen to write to the other side and say, "This must either come to an end, or we must come to some special terms," they would then have been in a position to enter their appearance, and to apply to dismiss the action for want of prosecution, or take any of the other steps open to them under the process of the Court. I can see no equity on one side or the other. It is a mere question of the construction of the rules of the Court, which I have already dealt with, and the performance of the contract to enter an appearance to which the ordinary Statute of Limitations applies.

I make an order upon the respondents to enter the appearance forthwith.

G. A. S.

Messrs. Kerly, Son & Verden appealed.

The appeal was heard on January 14, 15, 1901.

C. E. Jenkins, Q.C., and *D. M. Kerly*, for the appellants, in addition to the arguments used by them in the Court below, contended that the learned judge was wrong in holding that the written undertaking constituted a contract. The defendants did not authorize their solicitors to enter into any contract, but only to do a particular thing so as to render personal service unnecessary. There was no intention on the part of the solicitors, nor in fact of either party, to enter into any contract, and to do so would have been contrary to the practice. If, then, there was no contract, what was to prevent the defendants from withdrawing, as they did, their authority to enter an appearance—an authority which was intended to hold good for a certain time only? It is unreasonable to call upon a solicitor to enter an appearance when his authority has been

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withdrawn by his client. The question is really not one of contract at all, but of the process of the Court. What the defendant's solicitor does he does as an officer of the Court; and the question is whether there has been here such an undertaking as the Court ought to enforce. Now, appearance can only be entered to a writ that is enforceable; and this writ is no longer enforceable. When, in October, 1900, the plaintiff's solicitors wrote to the defendants' solicitors requesting them to enter an appearance, the twelve months from the date of the writ, limited by Order VIII., r. 1, for rendering a writ effective had long since expired. If, therefore, the plaintiff desired to proceed, it was her duty to apply under that rule for a renewal of the writ, which she has never done. She is therefore herself in default. Again, is there no limit to the undertaking? Can a plaintiff lie by and do nothing for nearly two years, and then apply to enforce the undertaking? The undertaking was personal to the members of the firm who gave it, and it is a mere chance that the members of the firm at that time are still practising. The original authority should now be treated, as it in fact is, as no longer in existence. Under the circumstances no misconduct can be charged against the appellants in having refused, at the instance of the plaintiffs, to enter an appearance.

Upjohn, Q.C., and *F. Gore-Browne*, for the plaintiff. The defendants' solicitors, not having entered an appearance pursuant to their written undertaking, have clearly rendered themselves liable to attachment under Order XII., r. 18: Lush's Practice, 3rd ed. p. 384. Application for attachment is properly made "in the matter of the solicitor," and not in the action, for, until the defendant is served or has appeared, there is no effective action on foot in which the application can be made against the defendant; moreover, an undertaking can be enforced against a solicitor in his capacity of an officer of the Court, whether the action is effective or not. Having regard to the language of Order IX., r. 1, Farwell J. was right in saying that this written undertaking was a contract or obligation of the defendants "by their solicitor." It is said that after the enlarged time for entering an appearance expired

on April 30, it was for the plaintiff to take the next step; but that is not so. It was the duty of the defendants' solicitors to have entered an appearance on May 1; not having done so, they were in default on that day. The defendants were on that day masters of the situation, and it was therefore for them to take the first step, not for the plaintiff. The matter being one for the exercise by the Court of its discretion over its own officers, as to whether this undertaking should be performed or not, we submit that there are no sufficient reasons or circumstances for saying that the undertaking should not be performed.

Then it is said that there is no longer any enforceable writ in existence to which an appearance can be entered. But that is not so. As the learned judge said, the meaning of Order VIII., r. 1, is that a writ of summons shall be in force for purposes of "service" for twelve months only—not that the writ after that time loses its efficacy for all purposes. The writ, notwithstanding the lapse of time, is still a valid writ and not a mere nullity: *Webster* v. *Myer* (1); *Richardson* v. *Daly*. (2)

The plaintiff can always apply to renew the writ after the expiration of the one year, which he could not do if it were dead altogether. An undertaking by a solicitor to enter appearance is a question of honour and good faith, and delay in proceeding on the part of the plaintiff is no answer unless it can be shewn that the defendant has been prejudiced by the plaintiff's default. The only default, if any, on the part of the plaintiff here was in not having applied sooner for an order to enforce the undertaking or for attachment.

[*Hamp* v. *Warren* (3) was also referred to.]

C. E. Jenkins, Q.C., in reply.

RIGBY L.J. In this case the question is whether the Court has jurisdiction to proceed against solicitors on an undertaking given by them. All sides are agreed that there has been no unfair conduct on the part of the solicitors, and they are not in any position of difficulty even if the position has been brought

(1) (1884) 14 Q. B. D. 231. (2) (1838) 4 M. & W. 384.
(3) (1843) 11 M. & W. 103.

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Rigby L.J.

about by their own delay, because very fairly and properly their clients say, "If you are now held liable under your undertaking, we will see that you do not suffer for it."

On February 24, 1899, the writ in this action was brought to the defendants' solicitors, and they then indorsed that writ with an undertaking to the effect that they "accepted service" for the defendants and would "enter an appearance in due course." That undertaking was given with the authority of the clients. We are not in any way concerned with what would have been the case if it were an authority usurped by the solicitors and not sanctioned by the clients, but the undertaking was given with the authority of the clients, and, in my opinion, from that moment all obligation as to service on the part of the plaintiff was waived—or at any rate the acceptance by the solicitors with the authority of the clients was equivalent to service upon the clients. That being so, the undertaking to enter an appearance at once became an unconditional undertaking. There was actual service upon the solicitors, and they accepted service: without service on the solicitors I should not have been ready to conclude that the undertaking would have taken effect. Having accepted service they then offered to compromise, and that offer was to last for two months. I do not think it was necessary on their part to intimate at the end of the two months that the offer was no longer a continuing offer; but I agree with the position taken by Mr. Upjohn, that at the expiration of the two months they ought, in pursuance of their undertaking, to have entered appearance. He acquits them, as every one under the circumstances would do, from any impropriety in not entering appearance then; but at any rate it was their place to enter an appearance, and not the plaintiff's place to do anything further in the way of service. Under these circumstances I think that Order VIII., r. 1, has no application at all, and that the defendants' solicitors cannot complain, and their clients cannot complain, of any delay on the plaintiff's part, for the delay has been really caused by the defendants' solicitors themselves in not entering appearance in accordance with their undertaking. I am of opinion, therefore, that they are now subject to the jurisdiction of the Court and

that they ought to enter an appearance. There is no wrong dealing at all. Their clients very fairly say, "If they ought to do it, then we will permit them to do it and authorize them to do it." It seems to me that the order made by Farwell J., that the solicitors do forthwith enter an appearance to the writ, was right. I do not apprehend that there will be any difficulty, but if there is, the application, which is in form an application for leave to issue a writ of attachment, should again be brought before the Court.

I say nothing about the contract point of view that has been taken by Farwell J.—as to whether that is right or wrong, for it seems to me not to be involved in this case, which is an application in the matter of the solicitors.

The appeal will be dismissed, and the costs both here and below must be paid by the appellants, the defendants' solicitors, who will get such indemnity from their clients as the clients think they are bound to give.

STIRLING L.J. I agree in the conclusion which has been arrived at by the Lord Justice.

Speaking for myself, I do not desire to decide anything in this case beyond what arises from the particular facts which are brought before us. Those are very short and simple. [His Lordship then stated the facts and read the correspondence, and proceeded :—]

The position which is taken up by the defendants' solicitors is a perfectly natural and intelligible one. No one makes any complaint as to it. It is stated in the affidavit filed by a member of the firm that after the receipt of the letter of October 24, 1900, he applied to the defendants for their instructions as to entering appearances for them, when they informed him that in view of the long delay on the part of the plaintiff they regarded the action as at an end, and directed him not to enter appearances; and that since the service of the notice of the present application he had again applied to them for instructions, and that at his request they had instructed him to do what the Court thought fit under the circumstances to direct. That is the position. The application before Farwell J.

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was, under Order XII., r. 18, to attach the solicitors for not having performed their undertaking. Farwell J., on the application of the plaintiff, made an order expressing his opinion to be, and ordering, that the defendants' solicitors should, in pursuance of their undertaking, enter an appearance in the action. The question is whether or not that order ought to be upheld.

The main objection which has been pressed upon us is that having regard to Order VIII., r. 1, the writ for all purposes is spent, so to speak; and no doubt Order VIII., r. 1, is to be taken into consideration on this question. It provides that "no original writ of summons shall be in force for more than twelve months from the day of the date thereof." That, it is conceded, does not mean that the writ is not to be in force for any purpose, but only that it is not to be in force for the purpose of service. Therefore, if it is not served within the period of twelve months it is no longer in force for service. But then follows this provision: "If any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ." So that there is a provision enabling a plaintiff, who has not served the writ in accordance with the rules of the Court, to apply to the Court or a judge for the renewal of the writ: "And the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time." Then the rule provides that "a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

Order IX., r. 1, provides that "no service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance." What has taken place here is not exactly in accordance with either

rule. The defendants' solicitors, with their authority, upon the receipt of the writ indorsed it, "We accept service and will enter an appearance in due course." That, it seems to me, means this: the defendants say, "You may treat us as served for the purpose of this action and a proper appearance shall be entered in due course." It is, as it seems to me, on the part of the defendants a dispensation from any further formal service, and is a matter which, under Order VIII., r. 1, would be taken into very serious consideration by any judge or Court which had to consider the question of the renewal of the writ or its efficiency. In my opinion, after a formal acceptance of service of a writ in that manner, it would require a strong case to say that at all events the writ ought not to be renewed. Here we have not to deal with that point, but are invited to say what, under all the circumstances of the case, is the proper thing to be done by the defendants' solicitors in this present action. The acceptance of service is one circumstance which, in my opinion, is of very great weight. Another circumstance of great weight, as it seems to me, is that the offer for compromise was only to remain open for two months, and that at the end of that period of two months the next step was to be taken in accordance with the undertaking of the defendants' solicitors to enter an appearance. That step was not taken. There has been a delay of eighteen months, and that is a circumstance which the Court has to take into consideration; but it seems to me that, looking at all the circumstances of the case, the delay has not been so great as to deprive the plaintiff of the right to say that, as regards service, this writ ought to be held by the Court to be still an effective writ, and one to which an appearance ought to be entered. The result, therefore, is that the appeal must be dismissed, and with costs.

Solicitors: *Kerly, Son & Verden; Loughborough, Gedge & Co.*

G. I. F. C.

C. A.
1901
Jan. 29.

In re TAYLOR.
GUARDIANS OF EDMONTON UNION *v.* DEELY.

[1900 T. 37.]

Lunatic—Pauper—Maintenance—Receiver—Debt—Death of Lunatic—Administration Action—Creditors, Rights of—Jurisdiction.

A pauper lunatic, while being maintained by the guardians of a union, became entitled to a fund, whereupon, on a summons in Lunacy by the guardians, who claimed six years' arrears for past maintenance, an order was made by the Court in Lunacy appointing a receiver of the fund, and directing him to pay thereout to the guardians part of the arrears, and to apply the balance for future maintenance. While under the care of the guardians the lunatic died. There then being a surplus in the hands of the receiver, the guardians commenced a creditors' administration action in the Chancery Division against the lunatic's administrator to obtain payment of the balance of the six years' arrears :—

Held, reversing the decision of Kekewich J., that the balance of arrears was a valid legal debt enforceable after the lunatic's death, and that the order in Lunacy was no bar to the action.

Ann Taylor, a person of unsound mind, was maintained, being a pauper, by the guardians of the Edmonton Union from November 1, 1889, until her death on June 22, 1899.

On the death of an uncle on October 14, 1895, she became entitled as one of his next of kin to 26*l.*

On February 24, 1898, the guardians applied, by a summons in Lunacy, for the appointment of a receiver of that fund, and for payment thereout of the cost of the lunatic's maintenance for the then preceding six years, there being 169*l.* 3*s.* 10*d.* owing in respect of that period.

On January 31, 1899, an order was made on that summons by a Master in Lunacy appointing a receiver of the 26*l.*, and directing him (after payment of costs) to pay "95*l.* 14*s.* due to the guardians for the maintenance" of the lunatic from October 14, 1895, to February 14, 1899, and to apply the balance of the money to be received by him in the future maintenance of the lunatic at 11*s.* per week. The lunatic was thenceforth maintained by the guardians, and the receiver paid them for

her maintenance out of the fund until her death, at which time a balance of over 100*l.* remained out of the 261*l.*

The lunatic died intestate on June 22, 1899, and the defendant was her administrator. The guardians then commenced a creditors' action by originating summons in the Chancery Division for an account of the sum due to them for past maintenance from February 24, 1892 (six years before the receivership summons in Lunacy), to October 14, 1895, and for payment by the defendant, or administration. The sum claimed by them as due for past maintenance amounted to 73*l.* 9*s.* 10*d.* The summons was dismissed by Kekewich J. with costs.

The guardians appealed.

The appeal was heard on January 29, 1901.

H. Greenwood, for the guardians. When the order in Lunacy was made there was a debt due to the guardians for past maintenance, and the Statutes of Limitation permitted them to claim arrears for six years. These arrears were a debt, and they did not cease to be a debt because part of it was discharged under the order in Lunacy. The Lunacy jurisdiction will not, during a lunatic's life, order creditors to be paid in full, if the effect is to leave the lunatic penniless; for the lunatic's comfort comes first, and the claims of creditors come second. But when the lunatic dies the reason for retaining money in hand for his comfort is at an end, and creditors ought to be paid before the next of kin take anything. The guardians are creditors, and the debt is sufficient to sustain a claim for administration: *In re Webster*. (1)

Ashton Cross, for the defendant. The question is res judicata. The order in Lunacy was not made "without prejudice" to any claim for balance: *In re Watson*. (2)

RIGBY L.J. There is no jurisdiction in Lunacy to bind a creditor in any proceedings in the High Court. The Lunacy jurisdiction prefers the present and future comfort of the lunatic to the claim of any creditor. The receivership order clearly directed payment only in respect of maintenance for a

(1) (1884) 27 Ch. D. 710. (2) [1899] 1 Ch. 72.

C. A. 1901 TAYLOR, *In re.* EDMONTON UNION *v.* DEELY.

particular period, and the claim of the guardians in respect of the rest of the six years remained and was capable of being enforced after the lunatic's death. The guardians are therefore entitled to maintain their action, and this appeal must be allowed.

STIRLING L.J. I agree. The claim is for a valid legal debt, and the Lunacy proceedings were not in the nature of an action to recover that debt. The order in Lunacy was merely a direction by the Lunacy authorities to their own officer to make certain payments, one of which was in respect of part only of the amount owing for past maintenance. It follows that the action will lie for the unpaid balance, so far as the Statutes of Limitation do not create a bar.

Solicitors: *Howard & Shelton, for F. Shelton, Tottenham; A. Hammond.*

G. I. F. C.

C. A. 1900 BYRNE J. *March* 1, 3. C. A. *Dec.* 6, 7.

In re HANCOCK. WATSON *v.* WATSON.

[1899 H. 2514.]

Will—Construction—Absolute Gift—Gift over on a compound Event—Perpetuity—Remoteness—Splitting Gift over—Cutting down absolute Gift—Settlement—Intestacy.

A testator who died in 1852 gave his residuary estate, which consisted wholly of personalty, to trustees in trust for his wife for life, and after her death (which happened) to be divided into five equal portions, which he allotted thus: "To S. D. (a married woman) I give two of such portions": and having allotted the remaining three-fifths in similar words to other persons, he directed that the two-fifths allotted to S. D. should remain in trust for her life for her separate use, and from and after her decease in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marriage if daughters; "but in default of any such issue" such two-fifths to be divided among the children of C. payable to sons at twenty-five or to daughters at twenty-one or marriage.

S. D. died in 1899 without ever having had a child. At her death there were children of C., daughters, who had all attained twenty-one or married:—

Held, by the Court of Appeal, affirming Byrne J., (1.) that the whole

gift over on the death of S. D. was void for remoteness, and could not be split up into separate contingencies so as to be construed as a gift over on one contingency—such as that of S. D. having no child—that might in itself be good as being within the limit of perpetuity; and (2.), that upon the death of S. D. there was no intestacy as to the two-fifths, but that, by reason of the invalidity of the gift over on her death, the original absolute gift remained, and, upon her death, passed to her representatives.

Where there is an absolute gift followed by a settlement of the subject of the gift, but the trusts of that settlement for some reason wholly or partially fail, there is, so far as they fail, no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift.

Evers v. *Challis*, (1859) 7 H. L. C. 531, distinguished on the first point, and *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, on the second.

RICHARD HANCOCK, who died on January 23, 1852, by his will, dated June 17, 1850, after appointing executors and trustees and giving various legacies, and also an annuity to Susan Drake, the wife of the Rev. N. R. Drake, gave his residuary estate to his trustees, their heirs, executors and administrators upon trusts for investment and payment of the income to his wife during her life, and after her death, subject to a disposition by her will of part of the residuary estate, "upon trust to be divided into five equal portions which I allot in the manner following: To the above-named Susan Drake I give two of such portions, To my brother William one such portion, To my brother Charles one such portion, And to the sons or son of my late brother Sampson the remaining one such portion: but it is my will and mind that the two-fifth portions allotted to the said Susan Drake shall remain in trust, and that she be entitled to take only the interest and annual proceeds of the shares so bequeathed to her, during her natural life and for her sole and separate use independent of her present or any future husband, but without power of anticipation; and from and after her decease in trust for the benefit of any child or children born unto her the said Susan Drake by her present or any future husband upon his, her or their attaining the age of twenty-five years if a son or sons, or if a daughter or daughters upon her or their attaining the age of twenty-one years or upon her or their marriage, whichever of those events may first happen; but in default of any such issue, then and in

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that case the said two-fifths of my residuary estate and any accumulations of interest thereon shall go and be divided, subject to the appointment of my wife, among the children of my brother Charles, but, if there be no such appointment, then to be equally divided among such children payable if a son or sons upon their attaining the age of twenty-five years and if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever event may first happen."

The testator's widow died on November 7, 1876, having made a will which, however, did not contain any appointment of the two-fifths bequeathed to Susan Drake.

Susan Drake died on June 26, 1899, without having had any issue, having made a will appointing executors.

The testator's brother, Charles Hancock, survived the testator but died in the lifetime of the widow leaving three children, daughters, all of whom survived the testator, Richard Hancock, and were still living and had long since attained twenty-one or married.

At the death of the testator his next of kin were his widow, his brothers William and Charles, and two children of his deceased brother Sampson.

The residuary estate of the testator consisted wholly of personal property of the value of 14,000*l.*

This was an originating summons taken out by the trustees of the will of Richard Hancock against the executors of Susan Drake, the three children of Charles Hancock, one William Jennings, representing the testator's next of kin, and Edward Hancock, one of the children of the testator's brother Sampson, for the determination of the following questions: (1.) Whether the gift by the testator Richard Hancock of the two-fifths of his residuary estate in favour of the children of Susan Drake was void for remoteness; (2.) If so, whether the subsequent trusts of those two-fifths in favour of the children of the testator's brother Charles had failed by reason of the remoteness mentioned in the first question, or by reason of their own remoteness; (3.) If so, whether those two-fifths belonged to the defendants the executors of Susan Drake;

or (4.) whether they devolved as upon an intestacy of the testator Richard Hancock.

The summons came on for hearing before Byrne J. on March 1, 1900.

Stokes, for the plaintiffs, the trustees.

Mulligan, *Q.C.*, and *Fawcus*, for the defendants, the executors of Susan Drake. The gift to Susan Drake is an absolute gift in the first instance, in the same terms as other gifts which are manifestly absolute; has this absolute gift been effectively cut down by the subsequent directions? We submit that it has not. The gift over is to a class on a contingency which is void for remoteness. "In default of any such issue" refers to the class already defined, some of whom must attain twenty-five years, therefore the gift to that class is void. If there is a gift over in one event, which will include another event which itself would be within the limit of perpetuities, the Court cannot split the gift so as to say that if the event occurs within the limit the estate shall go over, although, if that event does not occur, the gift over is void for remoteness: *Miles* v. *Harford* (1); *Proctor* v. *Bishop of Bath and Wells.* (2) This is not a case of alternative gifts over on the happening of two events, but a gift over on one event involving two things, and therefore void: *In re Harvey* (3); *In re Bence.* (4)

The decision in *Evers* v. *Challis* (5) rests on the feudal principles governing contingent remainders to which the rule against perpetuities does not apply, and is no authority for the proposition that every gift over may be analyzed into as many events as are included within its language, and be held good or bad as the events happen; the doctrine of *Evers* v. *Challis* (5) is confined to real estate, while this will deals with personal estate. *Watson* v. *Young* (6), so far as it differs from the propositions laid down in *In re Bence* (4), is no longer sound.

(1) (1879) 12 Ch. D. 691, 702.
(2) (1794) 2 H. Bl. 358; 3 R. R. 417.
(3) (1888) 39 Ch. D. 289.
(4) [1891] 3 Ch. 242.
(5) (1851) 18 Q. B. 231; 7 H. L. C. 531.
(6) (1885) 28 Ch. D. 436.

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The gift in the first instance being absolute, and the attempt to cut it down having failed, the absolute interest remains unaffected, and passes to Susan Drake's executors: *Ring* v. *Hardwick*. (1)

Rowden, Q.C., and *Ward Coldridge*, for the defendant Jennings, as representing next of kin, adopted this argument so far as it shewed intestacy over any part of the estate.

[BYRNE J. It would be more convenient to dispose first of the question of remoteness.]

Levett, Q.C., and *Quin*, for the defendants, the children of Charles Hancock. The gift over of Susan Drake's two-fifths is severable into two branches: *Jones* v. *Westcomb* (2); the terms of the gift can be split into as many separate gifts as there are possible events, so that whenever the actual event falls within the limits of perpetuity the gift over is good; whenever it falls beyond the limit it is bad: *Evers* v. *Challis* (3); *Watson* v. *Young*. (4) The Court of Appeal has not overruled *Watson* v. *Young* (4) in *In re Bence*. (5)

In any case the gift here is not an executory limitation; it is a contingent limitation in personal estate, or a gift in the nature of a remainder.

A. E. Russell, for the defendant, Edward Hancock, one of the next of kin.

Mulligan, Q.C., in reply.

BYRNE J. Undoubtedly there is considerable difficulty in this case, and the decision which has been so much dwelt upon in the House of Lords, of *Evers* v. *Challis* (3), does appear to me in some of its aspects to be difficult to reconcile with some of the observations which have been made upon it in the Court of Appeal in *In re Bence*. (5) But when I come to the case of *In re Harvey* (6), I find the rule laid down by the Court of Appeal in this way (7): "The question is whether the testatrix has made alternative gifts over on the happening of two

(1) (1840) 2 Beav. 352.
(2) (1711) 1 Eq. C. Ab. 245.
(3) 18 Q. B. 231; 7 H. L. C. 531.
(4) 28 Ch. D. 436.
(5) [1891] 3 Ch. 242.
(6) 39 Ch. D. 289.
(7) 39 Ch. D. 297.

events, or a gift over on one event involving two things. In order to make the gift good you must come to the former conclusion." That was a case of a will referring to personal estate, and, therefore, not involving any possibility of argument on the assumption that *Evers* v. *Challis* (1) laid down a rule appropriate only to the case of real estate. That is to say, Cotton L.J. treats the matter as one of construction in the case of personal estate. In order to make the gift good you must come to the conclusion that the testatrix has made an alternate gift over on the happening of two events, and he continues (2): "Here, if the limitation had been 'in case both my daughters shall die without leaving any child, or the issue of any child, living at the decease of the survivor of them, or shall die without leaving any child, or the issue of any child, living at the decease of the survivor of their present or any future husband who may survive them respectively,'—then if the former event happened, the gift over would be good. But that is not what she has done. In each case the testatrix gives a moiety of residuary estate to her daughter for life, then to her present or any future husband for life, and then to the daughter's children living at the decease of the survivor of the daughter and her husband, and the issue then living of any child or children of the daughter who may have previously died, such issue taking their parents' shares. The gift is to a class not to be ascertained till the death of the survivor of the daughter and her husband present or future; and on failure of that class, the moiety is given over on the trusts of the other moiety. Then comes the clause on which the question arises: 'And in case both my said daughters shall die without leaving any child living at the decease of the survivor of them or of the survivor of their respective present or any future husbands, then, after the death of such of my daughters as may happen to survive the other of them, and the death of the survivor of their respective husbands'—the property is given over. I think this points to one event. That one event is referred to appears to me to be made clear by this, that the testatrix does not, after saying, 'and in case both my daughters shall die

(1) 7 H. L. C. 531. (2) 39 Ch. D. 297.

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without leaving any child, or the issue of any child, living at the decease of the survivor of them,' begin again by saying, 'or in case both my said daughters shall die without leaving any child, or the issue of any child, living at the death of the survivor of their respective husbands,' but runs on, 'or of the survivor of their respective present or any future husbands.' It is a gift over on failure of a class to be ascertained at the death of the survivor of the daughters and their husbands present or future, and is bad for remoteness." Of course I need hardly say on this question of construction words are never or hardly ever the same, but if you find a decision where the words are so near that the application of the principle to the words of a second case must be a substantial application to the same set of words, I think it wrong to refine too much and to say, that in this particular will I can find a difference in applying the principle. What then must I do? I adopt what the Lord Justice has said in the case of *In re Harvey* (1), and proceed to apply my mind to the clause in the present case. The words run on as follows. [His Lordship read the gift and continued:—]

Now the gift to the class is "for the benefit of any child or children born unto her, the said Susan Drake, by her present or any future husband upon his, her, or their attaining the age of twenty-five years if a son or sons, or if a daughter or daughters, upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever of these events may first happen." That is clearly a bad gift. Can I fairly, upon the construction of this will, say that I can separate the gift into two contingencies? The testator has not in words expressly separated them, and the question is whether I can fairly read this gift, having regard to the way in which the rule has been applied in other cases, so as to apply the rule here and say, that this is divisible into the two contingencies. If the gift had had no other authority except the authority of *Evers* v. *Challis* (2), I might have taken another view, but I do think, having regard to the two cases before the Court of Appeal, *In re Harvey* (1) and *In re Bence* (3), I am not at

(1) 39 Ch. D. 289. (2) 7 H. L. C. 531. (3) [1891] 3 Ch. 242.

liberty to put this construction upon these words. It is to be observed that the words which follow are: "But in default of any such issue, then and in that case the said two-fifths of my residuary estate and any accumulations of interest thereon shall go and be divided, subject to the appointment of my wife, among the children of my brother Charles; but if there should be no such appointment, then to be equally divided among such children payable if a son or sons upon their attaining the age of twenty-five years, and if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever event may first happen." "In default of any such issue" means, primâ facie, such issue as are hereinbefore spoken of, that is to say, a son or sons attaining twenty-five, or a daughter or daughters attaining twenty-one or marriage. It is true that the event which is mentioned here does involve two things, that is to say, there would be no child attaining the age of twenty-five years or twenty-one years, as the case may be, if Susan Drake failed to leave any children at all; but it appears to me that I cannot fairly read this as the making of alternative gifts on the happening of two events, but that I must read it as a gift over on one event involving two things unless I were to depart from the reasoning of the Court of Appeal in the case of *In re Harvey*. (1) I think, therefore, that in this case I must hold upon the construction of this will that the gift over is void for remoteness.

The case was then argued upon the point, raised by questions 3 and 4 of the summons, namely, whether Susan Drake took an absolute gift, or only a life interest, so that on her death there was an intestacy, and the following cases were cited: *Lassence* v. *Tierney* (2); *Gompertz* v. *Gompertz* (3); *In re Wilcock* (4); *In re Richards* (5); *Kellett* v. *Kellett*. (6)

BYRNE J. I need not read again what was stated by Lord Cottenham in *Gompertz* v. *Gompertz* (3) and *Lassence* v.

(1) 39 Ch. D. 289.
(2) 1 Mac. & G. 551.
(3) (1846) 2 Ph. 107.
(4) [1898] 1 Ch. 95.
(5) (1883) 50 L. T. 22.
(6) (1868) L. R. 3 H. L. 160.

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Tierney. (1) The rule is sufficiently well known; the difficulty is in these instruments how to apply it, and cases are of value so far as they afford illustrations to let you know what the rule means and no more.

I apply myself to the will before me to see what the testator does. He says after his wife's death that his residue is to be held on trust—"to be divided into five equal portions, which I allot in the manner following, To the above named Susan Drake I give two such portions, To my brother William one such portion, To my brother Charles one such portion, And to the son or sons of my late brother Sampson the remaining one such portion." That is the conclusion of the original gift in the will, and it is conceded, as indeed it must be, that the words are sufficient to give, and would, standing alone, confer an absolute interest to each of these children in the portions so allotted and given. He then proceeds: "But it is my will and mind that the two-fifth portions allotted to the said Susan Drake shall remain in trust, and that she shall be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life, and for her sole and separate use independent of her present or any future husband, but without power of anticipation; and from and after her decease"—then follow the various trusts in favour of her children with remainders over, which I need not dwell upon now, in favour of others.

The question really is, Do these latter words that I have read, following upon that absolute gift, mean more than a settlement of the shares already given for the benefit of the legatee? Though I agree that in these matters different minds may come to different conclusions, I cannot attribute to the use of the words—"shall be entitled to take only the interest and annual proceeds of the shares," such a destruction of the original gift as not to admit of the application of what one would describe as being, in a clause of this kind, a settlement of the share before given. I think it really is a settlement for the benefit of the legatee of the share previously absolutely given to her. I do not go into the cases that have

(1) 1 Mac. & G. 551.

been cited, because in each of them I could point out circumstances shewing how they differ from the present one. I think this case is within the class of cases in which the original absolute gift prevails when there is a failure of the trusts of the settlement on the children. I think in this case there is no intestacy.

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[His Lordship accordingly made an order declaring, in answer to questions 1 and 2 of the summons, that the gift of Susan Drake's two-fifths in favour of her children and also the subsequent trusts thereof in favour of the children of Charles Hancock, were void for remoteness; and, in answer to questions 3 and 4, that the two-fifths belonged to the defendants, the executors of Susan Drake.]

W. C. D.

The defendants, the children of Charles Hancock, who also claimed under their father as one of the next of kin of Richard Hancock, appealed from that order so far as it declared that the subsequent trusts mentioned in question No. 2 of the summons were void, and asked by their notice of appeal that it might be declared that, in the event which had happened of Susan Drake having died without having had a child, such subsequent trusts were valid; or, in the alternative, that it might be declared that Susan Drake's two-fifths devolved as upon an intestacy. The appeal came on for hearing on December 6, 1900.

C. A.

Levett, Q.C., *Swinfen Eady, Q.C.*, and *Quin*, for the appellants. There are two distinct questions, (1.) whether the gift over of Susan Drake's two-fifths is void for remoteness; (2.) if it is, whether the two-fifths go to her representatives under the original absolute gift, or whether there is an intestacy as to the two-fifths.

[LORD ALVERSTONE C.J. As the first point is distinct from the other, it had better be argued separately.]

Upon the first point, it is submitted that the gift over can and should be split up into two distinct gifts—a gift over in case Susan Drake should have no children, and a gift over

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in the event of her having children, but none of them, if sons, living to attain twenty-five, or, if daughters, living to attain twenty-one or marrying. The former gift over is valid, and it applies in the event which has actually happened: *Evers* v. *Challis* (1) is an authority for this construction, and so is *Watson* v. *Young*. (2) The decision of this Court in *In re Harvey* (3) is, it is submitted, inconsistent with *Evers* v. *Challis*. (1) In *In re Bence* (4), Fry L.J., who delivered the judgment of the Court, was misled by the head-note to *Evers* v. *Challis* (1), which is not accurate.

Haldane, Q.C., *Mulligan, Q.C.*, and *Fawcus*, for the defendants, the executors of Susan Drake, were not called upon.

LORD ALVERSTONE C.J. Byrne J. has in his judgment expressed the true grounds upon which we found our decision in this case. It appears to me that the decision in *Evers* v. *Challis* (1) rested on the substantial distinction between a contingent remainder and an executory devise. In the case of a contingent remainder one has at the date, when the gift should take effect in possession, to ascertain the facts, and then decide whether the gift takes effect or not; whereas, in the case of an executory devise one has, at the death of the testator, to ascertain from the will whom the class includes, and if the class so determined includes objects who may not be ascertained within the limit of time allowed by the law against perpetuities, then the devise fails. To get over that difficulty, Mr. Levett argued that here there was a statement by the testator of two alternative events; and I think, if we could construe this will as stating two alternative events, the one of there never having been any children born, and the other of there being no children living to attain the ages mentioned, then, although in the latter alternative the gift would be bad, yet still, in the event which has happened, namely, the former alternative, the gift would be good. I do not, however, think that we can fairly construe the will as a statement of two alternatives, and I will say why I come

(1) 7 H. L. C. 531.
(2) 28 Ch. D. 436.
(3) 39 Ch. D. 289.
(4) [1891] 3 Ch. 242.

to that conclusion. The two-fifths in question are to go to children who attain twenty-five in the case of sons, and twenty-one or marriage in the case of daughters. Then come these words: "But in default of any such issue." It seems to me that the discussion that took place in *Evers* v. *Challis* (1) shews that we cannot construe the words "in default of any such issue" as stating two alternatives. I think, as was very well put by my learned brother Rigby in the course of the argument, that if that was so, the clause might have been broken up into three alternatives, namely, a gift over in the event of Susan Drake having (i.) no child, (ii.) no daughters who attained twenty-one, (iii.) no sons who attained twenty-five; and it might have been said that, as to the first two gifts over there was no objection, and that therefore the clause might be construed as including three alternatives. I think the meaning of the words "in default of any such issue" is "in default of any such issue as named." That being so, the class of issue referred to in the gift over can only be ascertained by looking at the class of issue described in the gift to the issue, and that class including individuals, or a class of individuals, the inclusion of whom makes the gift infringe the law against perpetuities. In my opinion the decision of Byrne J. was perfectly right, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I agree that the decision in *Evers* v. *Challis* (1) depends upon the essential, not the accidental difference between a contingent remainder and an executory gift. In the case of a contingent remainder, no one looking at the will at the date of the testator's death can have the remotest idea whether the gift will take effect or not: you must wait and see whether the contingency happens. I am not dealing now with any modern changes in the law, but with the original doctrine of contingent remainders. A contingent remainder depends upon a particular estate. During the whole duration of that particular estate it may remain uncertain whether the contingent remainder will take effect or

(1) 7 H. L. C. 531.

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not. It is upon the determination of the particular estate that the inquiry comes. Has the contingency happened? or does it now happen? Because it may be quite possible that it should happen eo instanti that the particular estate determines.

Now, I consider that *Evers* v. *Challis* (1) has absolutely nothing to do with the law of perpetuities. To take an illustration: Suppose a gift is made that is perfectly good so far as the law of perpetuities is concerned, in this way, "To A. for life, and if A. shall have no child who attains twenty-one, to B." As a contingent remainder, if at the death of A. there was living a child of A. who had not attained twenty-one, the gift to B. would fail because it was not ready to take effect eo instanti the particular estate determined. But supposing that at the death of A. he had had no child, then, without going through any formality of splitting up the gift, you only inquire, "Has the contingency happened? Has there been no child?" And the only answer would be, "No; there is no child." Therefore there can be no child who attains twenty-one; and the result that there is no child leads of necessity, not by splitting up at all, to the conclusion that the event contemplated has occurred. There is no child, and thus there can be no child attaining twenty-one.

Let us consider the case of executory gifts. As I have understood the law, it was not questioned, and I do not think it can be, that you must at the testator's death be able to tell whether the gift will come into operation. A competent adviser would be able to tell whether the gift was void for perpetuity or not. He would say, "In a possible case the gift may sin against the law of perpetuities; we cannot wait to see what the result is and how the facts turn out." The gift must be void; it is void, and without waiting at all, he is able to say so.

Now we have here the words "in default of any such issue." It is very attractive to say, "Split up the gift into its component parts, and then one of those component parts is all right, though the others may be wrong;" but that seems to

(1) 7 H. L. C. 531.

me to be absolutely and entirely illegitimate. It is very right to take a view corresponding to that in the case of contingent remainders, but you have to consider possible, not actual, events, and a possible future event, whether it happens or not, would be that there might be a son, for instance, alive at the tenant for life's death as to whose taking you could not predicate anything; and it is no answer to that to say, "Well, if there are no children—that is to say, in another and different possible event—it will be all right." That is not the consideration at all. The question is whether there can be any event in which the gift will be outside the law of perpetuities? If so, then, whatever the actual result may be thereafter, that is a void gift. Undoubtedly, if the testator had said, "if Susan Drake has no children the gift may go over," that would be a perfectly good gift, and then it would be immaterial to inquire whether any other alternative which the testator proposed took place or not, or could take place within the limits of perpetuity. But if he has happened so to frame his gift that in any possible circumstances it will be void, then, according to the law of perpetuities, it will be altogether void.

It seems to me, therefore, that this case, which is a case of a gift of personalty, is altogether fundamentally—not accidentally, or because there are words here and words there—but necessarily and fundamentally outside the decision of *Evers* v. *Challis* (1), and I am not aware of any other case—except *In re Harvey* (2), in which the decision of North J. was overruled by the Court of Appeal—saying that a gift of this kind is different from every other similar gift which is obnoxious to the doctrine of perpetuities, because it can, it is said, be split up and made what it is not and what the testator never dreamt of, namely, separate gifts taking effect in separate cases and on separate events.

VAUGHAN WILLIAMS L.J. I am of the same opinion. As to the general rule of law, as I understand it, it is this: when a testator, having made a gift, has not divided it into two gifts, or alternative gifts, the law generally will not do it for him merely

(1) 7 H. L. C. 531. (2) 39 Ch. D. 289.

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because the contingency on which the gift is to take effect is, so to speak, a compound contingency capable of being divided into two events. If the testator himself has neither divided the gift nor the compound contingency into two, the law will not do it for him. But, as I understand, to this general rule the case of *Evers* v. *Challis* (1) is an admitted exception. But when one looks at what were the conditions of the exception, it is perfectly plain that *Evers* v. *Challis* (1) has no application whatever; and therefore one has to go further and see whether there is any principle involved in *Evers* v. *Challis* (1) which ought to induce us in the present case to divide the gift, or divide up this compound contingency. As far as I can see, there is nothing either upon principle or upon the authorities requiring us to do so. The result is that we have one gift that is to take effect upon the happening of one compound contingency, a gift which in a possible event might take effect at a time too remote within the rule against perpetuities.

Levett, Q.C., Swinfen Eady, Q.C., and *Quin*, for the appellants. As your Lordships have decided the first point against us, we now contend, on the second point, the appellants being next of kin of the testator, that there was an intestacy of Susan Drake's two-fifths. The original gift to her, which, if there had been nothing more, would, we admit, have been an absolute gift, is qualified by the subsequent trusts; so that it must be read as a gift for certain prescribed purposes, that is, for her life only, and after her death for certain other purposes which, your Lordships have held, are void; accordingly, upon her death, the gift failed altogether: *Lassence* v. *Tierney* (2); Theobald on Wills, 5th ed. 430.

A. E. Russell, for the defendant, Edward Hancock, took the same view.

Haldane, Q.C., Mulligan, Q.C. and *Fawcus*, for the defendants, the executors of Susan Drake. We rely upon the well-settled rule that where there is an absolute gift, followed by an attempt to limit such gift, and such limitation for some reason

(1) 7 H. L. C. 531. (2) 1 Mac. & G. 551, 564, 569.

cannot take effect, the original gift remains: *Cooke* v. *Cooke* (1); *Ring* v. *Hardwick* (2); *Whittell* v. *Dudin.* (3)

Levett, Q.C., in reply, referred to *Gompertz* v. *Gompertz.* (4)

Stokes, for the trustees.

LORD ALVERSTONE C.J. The second question that arises on this will is whether, inasmuch as the two-fifths which were the subject of the bequest to Susan Drake, cannot, by reason of our previous decision, be dealt with under the trusts subsequently declared, those two-fifths belong to Susan Drake absolutely or pass to the testator's next of kin as on an intestacy. The rule, as I understand it, is that laid down by North J. in *Cooke* v. *Cooke* (1), namely, that where there is an absolute gift followed by an attempt to limit the effect of that gift, and this limitation for some reason cannot take effect, the original gift will take effect. On the other hand it is said that, upon the true construction of this will, you cannot sever the gift from the purposes for which it is expressed to be given, and that, as those purposes cannot be carried into effect, the entire gift fails. Mr. Levett has very fairly admitted that by this will there is an absolute gift in the first instance, but says that the gift must be construed as qualified by the subsequent trusts. I think when we examine the authority on which he so much relied—*Lassence* v. *Tierney* (5)—that is clearly an example of the cases in which there has been no absolute gift. On the other hand, *Ring* v. *Hardwick* (2) is an example of the cases in which there has been an absolute gift; and that case shews that the mere general intention of the testator to cut down the gift, so that the subject of it shall be disposed of in a certain event which fails, cannot be regarded as conclusive that the original absolute gift cannot take effect.

I come to the conclusion upon this will that the effect of the bequest to Susan Drake was first to give her the two-fifths absolutely, and that the effect of the subsequent words was to provide for that share being dealt with in a particular way if

(1) (1887) 38 Ch. D. 202, 208.
(2) 2 Beav. 352.
(3) (1820) 2 Jac. & W. 279; 22 R. R. 124.
(4) 2 Ph. 107.
(5) 1 Mac. & G. 551.

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certain events occurred; and that, applying the rule laid down by North J. as the ultimate provisions are either invalid or have failed, the original gift takes effect. I think, therefore, this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I think there is to be gathered from the general line of authority one clear principle—that if a gift is absolute in the first instance, and the provisions that follow are a mere settlement of that gift, then the settlement, if it is effectual, will have operation, reducing what appears to be an absolute gift to a life estate only. If, however, the settlement for any reason fails, then, in so far as it fails, there is no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift. In this case there is, in my opinion, a plain absolute gift in the first instance—as good a gift to Susan Drake as to her brother William and her brother Charles. But then there is a settlement of her gift, and it seems to me that if she had brought her action while she was alive, and had pointed out that the only trust was a trust for herself for her separate use, and that all the other trusts disappeared because they were invalid, there would have been a judgment in her favour.

VAUGHAN WILLIAMS L.J. I agree.

I only wish to say a word upon two cases that were cited. In *Lassence* v. *Tierney* (1) there was no gift except the gift which was constituted by the description of the mode of enjoyment, and that was the ground of the decision. In *Gompertz* v. *Gompertz* (2) it is quite true there were words which were amply strong enough to constitute an absolute gift, and I do not know, so far as the provisions in the testator's subsequent directions were concerned, that they were any more antagonistic to an absolute gift than the provisions are in the present case. But the ground of the decision there was, not that the absolute gift was negatived or cut down by the provisions which followed, but that upon the words in which those provisions

(1) 1 Mac. & G. 551. (2) 2 Ph. 107.

were embodied there was not merely a direction as to the mode in which the original gift was to be enjoyed, but a diminution of the original gift.

In the present case it seems to me that there are no words cutting down the original absolute gift, which must therefore take effect.

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LORD ALVERSTONE C.J. The appeal is dismissed with costs.

Solicitors: *Wadeson & Malleson; Bone & Heppell; Thorowgood, Tabor & Hardcastle.*

G. I. F. C.

EWART *v.* FRYER.

[1899 E. 953.]

C. A. 1900 KEKEWICH J. *March* 28. C. A. *Dec.* 10, 11.

Lease—Lessor and Lessee—Limited Company—Re-entry on Liquidation, Condition for—Solvent Company — Voluntary Liquidation — Underlease — Relief of Underlessee against Forfeiture—Rent—Tavern—Public-house—Tied House—Discretion of Court—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 2 (*xv.*); *s.* 14, *sub-ss.* 1, 2, 3, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2; *s.* 4.

In granting relief under s. 4 of the Conveyancing and Law of Property Act, 1892, to an underlessee against the forfeiture of the head-lease, the Court has, under that section, the most ample discretion in fixing the terms, covenants and conditions, as to rent and otherwise, of the new lease vesting in the underlessee the property, or any part thereof, comprised in the head-lease—a discretion which is to be exercised having regard to all the circumstances of the case (including the circumstance that the forfeiture has operated to vest in the original lessor the whole of the rights in the demised premises), unfettered by any limitation except that contained in the latter part of the section, namely, that the underlessee shall not be entitled to require a lease for a longer term than he had under his original sub-lease.

A lease of a tavern was granted to a limited brewery company for a term of thirty years at a yearly rent of 300*l.*, with a condition for re-entry if the lessees "should enter into liquidation either compulsory or voluntary." On the same day the company granted an underlease of the tavern to a publican for a term of twenty-nine and a quarter years at a yearly rent of 800*l.*, reducible to 300*l.* so long as he got his beer from the company.

Subsequently the company, which was perfectly solvent, went into

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voluntary liquidation for the sole purpose of amalgamation with two other solvent brewery companies, so as to form one new brewery company, and assigned the original lease to that new company. Thereupon the original lessor, claiming that the voluntary liquidation of the original lessee company had occasioned a forfeiture of the lease, brought an action against the underlessee and the new company to recover possession of the tavern. The underlessee then counter-claimed under s. 4 of the Conveyancing and Law of Property Act, 1892, for relief against the forfeiture (if any), and insisted that the rent to be payable under any new lease which might be granted to him under the section should be no larger than that fixed by his original underlease:—

Held, by Kekewich J. and by the Court of Appeal, that the voluntary liquidation of the lessee company had occasioned a forfeiture of the original lease: *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. 79; and that the Court, in fixing the terms of the new lease to be granted to the underlessee under s. 4, had power to vary the rent which had been reserved by the original underlease, having regard to the circumstance that the tavern, by reason of the forfeiture of the original lease and the consequent destruction of the underlease, had ceased to be a tied house.

THIS action was brought by the trustees and executors of the will of Colonel Ewart, deceased, against Frederick James Fryer and Watney, Combe, Reid & Co., Limited, to recover possession of certain premises known as the "Boundary Tavern," Commercial Road, St. George-in-the-East.

By an indenture of lease, dated October 26, 1896, Colonel Ewart, the freeholder of the tavern, demised it, in consideration of a premium of 8500*l.*, to a company called Combe & Co., Limited, for a term of thirty years from December 25, 1895, at a yearly rent of 300*l.*; and the lease contained a proviso that the lease was upon the express condition that "if and whenever the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary," it should be lawful for the lessor in or upon the demised premises to re-enter and the same peaceably to hold and enjoy as if the lease had not been made. The lease also contained a proviso against assignment without the leave of the lessor.

By an indenture of underlease dated the same day, October 26, 1896, Combe & Co., Limited, in consideration of a premium of 8000*l.*, sublet the tavern to the defendant Fryer for a term of twenty-nine years and a quarter from June 24, 1896, at a yearly rent of 800*l.*, reducible to 300*l.* so long as he

got his beer from the company. The premium of 8000*l.* was not paid; but by an indenture of mortgage of the same date, October 26, 1896, by way of sub-demise, the defendant Fryer mortgaged his underlease to Combe & Co., Limited, to secure 8400*l.* and further sums not exceeding in the whole 8700*l.* The defendant Fryer took possession of the tavern in accordance with his underlease and was still in possession.

On June 29, 1898, the defendant company was incorporated for the purpose of amalgamating the undertakings of Watney & Co., Limited, Combe & Co., Limited, and Reid's Brewery Company, Limited; and for the purpose of carrying this amalgamation into effect special resolutions for the voluntary liquidation of Combe & Co., Limited, and the two other amalgamating companies, were passed and confirmed on December 29, 1898, and January 13, 1899, respectively. It was conceded that all the amalgamating companies were at the date of liquidation not only solvent, but that their several assets largely exceeded their liabilities and the amounts of their capitals. In June, 1899, the liquidators of Combe & Co., Limited, applied to the plaintiffs, who had had no previous knowledge of the fact that Combe & Co., Limited, had gone into voluntary liquidation, for leave to assign the head-lease to the defendant company, but leave was refused on the ground that the voluntary liquidation had occasioned a forfeiture.

On July 12, 1899, the lease was assigned by Combe & Co., Limited, to the defendant company without the leave of the plaintiffs.

On August 12, 1899, the plaintiffs served two notices on the defendant company, one addressed to Combe & Co., Limited, and the other addressed to the defendant company, demanding delivery up of possession of the tavern on August 14, in pursuance of the proviso for re-entry contained in the lease in the event of the lessees going into liquidation; but possession was refused; whereupon, the next day, August 15, the plaintiffs issued the writ in this action. The defendant company, in effect, denied that any forfeiture had been occasioned, inasmuch as the lessees were solvent at the date of the voluntary liquidation, and pleaded that no notice had been served on Combe &

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Co., Limited, or on the defendant company such as is required by s. 14 of the Conveyancing and Law of Property Act, 1881, and they also set up a case of waiver by the plaintiffs. The facts relied on in support of this defence were that the winding-up of Combe & Co., Limited, had been advertised in the *London Gazette* of January 17, 1899, and that the rent due to the plaintiffs from Combe & Co., Limited, for the two quarters ending on Christmas Day, 1898, and Lady Day, 1899, had been paid by the cheques of the defendant company; but it appeared from the evidence that the advertisement of the winding-up had not come to the knowledge of the plaintiffs when they accepted those cheques. The defendant Fryer counter-claimed for an order under the Conveyancing and Law of Property Act, 1892, vesting in him the demised premises for the residue of the term of his underlease upon such conditions as the Court might think fit.

The action and counter-claim came on for trial before Kekewich J. on March 28, 1900.

With reference to the terms upon which a new lease should be granted to the defendant Fryer, expert evidence was adduced on behalf of the plaintiffs to the effect that the rent of 300*l.* was insufficient if the tavern ceased to be a tied house; and, further, that it was insufficient in any event, apart from the premium of 8000*l.*

In the course of the arguments ss. 2 and 14 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and ss. 2 and 4 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), were referred to. (1)

(1) Conveyancing and Law of Property Act, 1881, s. 2: "In this Act . . . . (xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy."

Sect. 14: "(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time there-

Warrington, Q.C., and *T. T. Method*, for the plaintiffs.

Warmington, Q.C., *Renshaw, Q.C.*, and *J. D. Davenport*, for the defendant company.

R. Merivale, for the defendant Fryer.

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after, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

"(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

"(3.) For the purposes of this section a lease includes an original or derivative underlease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative underlessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative underlessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns."

"(6.) This section does not extend—(i.) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest."

Conveyancing and Law of Property Act, 1892, s. 2: "(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto."

Sect. 4: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances

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KEKEWICH J., after stating that he was bound by the decision of the Court of Appeal in *Horsey Estate, Limited* v. *Steiger* (1) to hold that the voluntary liquidation of Combe & Co., Limited, had occasioned a forfeiture, and after holding that there had been no waiver by the plaintiffs, continued as follows:—

The amalgamation, or rather the steps which were necessary for amalgamation, worked a forfeiture, and the result is that the lease and underlease are absolutely gone. There is no question now of setting up the underlease again. Whatever the Court does, whether in the exercise of statutory power or any other jurisdiction, must be the creation of some new interest. The term of the underlease is not revived, but a new estate is vested in the underlessee. That is what Charles J. did in the case of the *Wardens of Cholmeley School, Highgate* v. *Sewell* (2), and what the Court of Appeal refused to do in the case of *Imray* v. *Oakshette*. (3) It is not possible, it seems to me, to argue that there is any revival of any estate; but where the underlessee is himself blameless, the Court may vest in him a new estate, in order that injustice may not be done to an innocent man, who for no fault of his own has been deprived of that which he had contracted to acquire. Sect. 4 of the Act of 1892 provides that "where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property." Pausing there, one may observe that the Court may vest the property for the whole term or a part only of the term. There

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of each case shall think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

(1) [1899] 2 Q. B. 79.
(2) [1894] 2 Q. B. 906.
(3) [1897] 2 Q. B. 218.

is an express proviso that the underlessee cannot require a new lease for more than the term. The Court may also grant an interest in respect of part only of the property. So far as I am aware, no case has occurred in which those possible variations have been discussed; but *Imray* v. *Oakshette* (1) shews that there is a very large discretion in the Court, and that the Court will exercise that discretion in giving to the underlessee anything which fairly, in the view of a Court of Equity, he is entitled to have. Then the section proceeds to say that this may be done "upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit." And that ends the section, except that there is a proviso, which I have already mentioned, that the underlessee is not to have a greater term than that granted to him in the first instance. It is a little difficult to construe those words. I find it impossible to define at present, without further argument, what was contemplated by "payment of rent, costs, expenses, damages, compensation, giving security"; and the main difficulty arises in knowing what is meant by "payment of rent." Mr. Warmington's explanation is this—that it means only payment of rent up to this time. Presumably the lease is forfeited some time before application is made under this section by the underlessee, and presumably he has not paid rent in the meantime, and it is said, and so far I think truly, that the Court is at liberty to impose the obligation of payment of rent up to the present time, as was done by Charles J. in *Wardens of Cholmeley School, Highgate* v. *Sewell*. (2) I cannot think that those words can have been put in for that purpose only. I hardly think that "payment of rent" can be intended to be limited merely to rent due. I think I ought to construe this part of the section as conferring upon the Court, in determining the conditions upon which the new estate shall be vested, a very large discretion to be exercised with reference to the particular circumstances of each case. If you meet with a case such as that before Charles J., probably the right thing to do is simply to give the underlessee a new lease upon the

(1) [1897] 2 Q. B. 218. (2) [1894] 2 Q. B. 906.

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original terms. If you meet with a case like *Imray* v. *Oakshette* (1), the proper thing probably is to refuse the underlessee a lease upon any terms whatever. Here I have a case of perfect honesty on the part of the underlessee. He took his lease long before Combe & Co., Limited, were amalgamated with the larger firm, or were contemplating such amalgamation. He forfeited the lease which they granted to him and the covenant for quiet enjoyment which they covenanted to secure to him simply because they have technically forfeited their original lease. He is perfectly blameless in the matter, and therefore he is entitled to every consideration from the Court. But there is somebody else to be considered besides Mr. Fryer. The lessors come here to insist upon their legal right of forfeiture, and there is no doubt they are entitled to do so. Although I am embarrassed by the wording of this section, I think I am bound to take into consideration the circumstances of the case and to impose such conditions as on fair consideration of all those circumstances they require. Now, what are those conditions? I pass by entirely the ordinary covenants which would be inserted in the lease of a public-house, because there will be no difficulty in settling those; but Mr. Fryer has further covenanted in his original underlease to buy his beer of Combe & Co. That is a covenant which will not be in his new lease. There is no reason to insist upon it, and it would be absurd, because it would be for the benefit of Combe & Co. whose lease is forfeited, and not for the benefit of the plaintiffs who are the new lessors. It may be that in some other respects there will be a modification of the covenants he has entered into, but the real question is about the rent. I am assuming now that I am at liberty to say that the rent shall be varied if it ought to be varied. I find no express power to that effect, I find nothing in words saying that I may vary the rent, but I have already said I do not think the words "payment of rent" in the section necessarily mean that I cannot vary the rent, and the general words of the section point to my doing that where the circumstances require it. Now, do the circumstances require it here? Mr. Fryer in terms contracted

(1) [1897] 2 Q. B. 218.

to pay 800*l.* a year rent, reducible to 300*l.* a year so long as he bought his beer of Combe & Co. That was the form of the contract, but the substance of it was that Fryer contracted to pay 300*l.* and to buy his beer from Messrs. Combe & Co. That is all that he ever intended to pay though coupled with the tie, and so far as he is concerned it would be perfectly fair to him to put him in the position which he now occupies. But I do not understand that to be the intention of the Legislature. It is not a question of compensation or anything of that kind: it is a question on what terms a new estate ought to be created fairly towards all parties concerned. I have evidence—really uncontradicted evidence—that 300*l.* a year is too small a rent for an untied house, as this will be when Mr. Fryer gets his lease from the present plaintiffs, and I think there is further evidence which is cogent to shew that 300*l.* a year was too little rent to ask Mr. Fryer if it had not been by way of arrangement and on payment of a sum which had to be paid and for which he gave a mortgage. While it might be fair to Mr. Fryer, who as I say is innocent, to give him a lease on the old terms as regards rent, it would be extremely unfair, I think, to the lessors who are now coming in, claiming on their original title. I think, therefore, I must make Mr. Fryer pay a fair rent. What that is I do not know. I do not think the evidence is sufficiently plain on that point, and I must refer it, and declare that the plaintiffs are entitled to recover as a forfeiture. I must vest the property in Mr. Fryer for a term commensurate with the original lease upon conditions which must be hereafter settled in chambers. I must direct an inquiry as to what is a proper rent for him to pay having regard to all the circumstances of the case, including the absence of the covenant which makes it a tied house, and then I must direct the execution by him of a deed covenanting for payment of that rent so ascertained and providing for all other covenants and provisions proper to be inserted in a lease of this character from the plaintiffs to him. It will not be a lease, because I vest it in him by force of the section; but it will be a document which contains all the elements of a lease, except the actual demise.

H. B. H.

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The defendants appealed separately.

The appeals were heard on December 10 and 11, 1900.

Warmington, Q.C., and *R. Merivale*, for the appellant, the defendant Fryer.

There are three points:—

(1.) That there was no forfeiture, because the liquidation of the lessee company was only for the purpose of reconstruction. But this point cannot well be raised in this Court after its decision in *Horsey Estate, Limited* v. *Steiger*. (1)

(2.) That the forfeiture (if any) was waived by the acceptance of rent by the lessor after the resolution to wind up voluntarily had been advertised, as required by the Companies Act, 1862, s. 132. This advertisement was notice to all the world of the resolution to wind up: *Chapman's Case* (2); and

(3.) It is submitted that, if there was a forfeiture and it was not waived, the learned judge did not give the full relief to which the appellant, the defendant Fryer, was entitled under s. 4 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). Upon this latter point, which is really the main point on this appeal, the learned judge said Fryer should have a new lease on the terms of his paying to the lessors in respect of the premises such a rent—that is, such a new rent—as should be fixed in chambers as the rent properly payable for an untied public-house. We submit that the learned judge has gone beyond the terms of the section, for it does not allow of a new rent being fixed. The true view of the section is that the only rent to be allowed is the rent due to the lessor who has brought the action or insisted on the forfeiture.

[ROMER L.J. The section includes among the conditions "payment of compensation." Why cannot compensation take the form of rent?]

"Compensation" is in respect of that which by the "forfeiture" the lessor has lost; that is to say, it is in satisfaction of what he has lost. "Compensation" does not include rent. Sect. 4 of the Act of 1892 contains the same words as s. 14,

(1) [1899] 2 Q. B. 79. (2) (1866) L. R. 1 Eq. 346.

sub-s. 2, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), except "payment of rent," which words were not necessary, because the result of granting relief to the lessee under that Act was to set up the old lease with the old rent, whereas the effect of s. 4 of the Act of 1892 is to create a new lease, which must provide for "payment of rent." The Act of 1892 enables the Court to grant the underlessee wider relief than the Act of 1881, and does not, while giving the Court power to impose conditions upon the underlessee, authorize it to raise his rent beyond that which was payable to the head lessor under the head-lease: *Wardens of Cholmeley School, Highgate* v. *Sewell.* (1) Fryer has not been guilty of any negligence or want of caution disentitling him to the extensive relief given by s. 4: *Imray* v. *Oakshette.* (2)

Renshaw, Q.C., and *J. D. Davenport*, for the appellants, the defendants, Watney, Combe, Reid & Co., Limited. Having regard to the recent decision of the Court of Appeal in *Horsey Estate, Limited* v. *Steiger* (3), we cannot now contend that the voluntary liquidation for the purpose of amalgamation was not within the condition for re-entry in the event of a "voluntary liquidation." But it may be pointed out that in that case the object of the liquidation was "reconstruction," whereas here it was amalgamation.

[ROMER L.J. referred to *In re Oriental Bank Corporation.* (4)]

There is a second point, whether a sufficient notice of the breach of the condition was given within s. 14, sub-s. 1, of the Conveyancing Act, 1881. The effect of s. 2, sub-s. 2, of the Act of 1892, qualifying s. 14, sub-s. 6, of the Act of 1881, is to make notice necessary in the case of a forfeiture for liquidation; but as notice to deliver up possession by a certain day was given and possession was positively refused, we cannot contend, after the opinion expressed by the Court in *Horsey Estate, Limited* v. *Steiger* (5), that the notice was insufficient.

Warrington, Q.C., and *T. T. Methold*, for the plaintiffs. The points as to the meaning of the condition for re-entry and as

(1) [1894] 2 Q. B. 906, 913.
(2) [1897] 2 Q. B. 218.
(3) [1899] 2 Q. B. 79.
(4) (1884) 28 Ch. D. 634.
(5) [1899] 2 Q. B. at p. 91.

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to the sufficiency of the notice not being now contested by the appellants, the only questions remaining are with regard to the alleged waiver of the forfeiture and the construction of the statutes. As to the waiver, there is no evidence of our having waived the forfeiture by the acceptance of rent. On the contrary, the evidence shews that when we accepted rent we were entirely ignorant of Combe & Co., Limited, having gone into voluntary liquidation.

Then, with regard to the construction of the statutes. There is an important distinction between s. 14, sub-s. 2, of the Act of 1881 and s. 4 of the Act of 1892. The former deals with an application for "relief" against forfeiture, the result of giving the relief being that the lease remains, and therefore the "terms" of relief stipulate only for compensation in respect of the past, except the granting of an injunction against any future breach—a term very seldom resorted to. Accordingly, in that case, the lease stands. But s. 4 of the Act of 1892 deals with a person having no relation to or privity with the lessor. The application under that section is not for "relief," but is a special application made for a vesting order by the person claiming as underlessee an estate or interest in the property comprised in the lease, and upon that application the Court may make an order vesting in the applicant, for the whole term of the lease or any less term, the whole or any part of the property comprised in the lease. As to the length of the term, the Court has an absolute discretion, except that it is restricted from vesting the property in the underlessee for a longer term than that of the underlease, but there is nothing to prevent the Court vesting it in him for a shorter term. Therefore it is necessary that the Court should have power to settle the rent to be paid by the underlessee: for instance, it would have to apportion the rent as between the property vested and the property not vested. So, again, the Court may fix the "conditions" on which the property is to be vested. In short, a new lease is created, requiring the fixing of a new rent and new conditions; the Court is making a fresh contract between lessor and lessee—a contract that did not exist before; and, in making the new contract, the circumstances both of the lessor

and of the lessee are to be taken into consideration. As regards the lessor, it is not intended that his legal right—a right given him by the forfeiture—should be taken away by allowing him less for his land than he had been receiving before. The intention is that his rights should be protected.

Warmington, Q.C., in reply.

RIGBY L.J. In this case the question arises whether the compensation which can under s. 4 of the Conveyancing Act, 1892, be given to an underlessee ought to be given on the principle decided by Kekewich J., or on some narrower principle. I think we are all agreed—in fact, we have not called upon the respondents to argue the question—as to waiver. We do not think there was any waiver that could be established against the respondents, the plaintiffs. The real dispute is whether the underlessee can gain an advantage out of the forfeiture. He covenanted to pay a rent of 800*l.* a year if the house was not a tied house, and 300*l.* a year if it was a tied house, he getting his beer from Combe & Co., Limited. The lease to Combe & Co., Limited, has altogether ceased to exist, and there is now no possibility of the beer being taken from their brewery; and, of course, if the underlessee can nevertheless get the property at a mere rent of 300*l.* a year he will be better off by 500*l.* a year than he has been. I do not think that is right. I think Kekewich J. was right in saying that care must be taken so to fix the rent that he does not get that advantage. I think that the decision arrived at by the learned judge was right, and that the appeal ought to be dismissed with costs.

VAUGHAN WILLIAMS L.J. I agree. [His Lordship then stated the facts, and continued:—]

It has been held—and nobody disputes but that it was rightly held—that the voluntary liquidation constituted a forfeiture. It constituted a forfeiture which Mr. Ewart's representatives were entitled to enforce, and which they have enforced. It seems to me that great stress ought to be put upon that fact, because that fact is, in my opinion, the key of the judgment that I am going to deliver. Under these

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circumstances, Mr. Fryer, the underlessee—whose interest will, of course, if nothing is done, be destroyed by the forfeiture of the lease of his lessors, Combe & Co., Limited—comes under s. 4 of the Act of 1892 to do what I think is aptly and properly described as "applying for relief"; and the question is, What are the powers of the Court in respect of that relief, and what are the conditions upon which relief ought to be granted? The practical way in which the question arises is this: Is Fryer, the underlessee, entitled to say that he should have a lease vested in him at a rental of 300*l.* a year, or is he, in some way or other, to pay either the 800*l.* a year, or at all events some figure larger than 300*l.* a year?

Now, in my judgment, s. 4 of the Conveyancing Act, 1892, was intended to protect a vested interest which the Legislature thought ought to be protected. At law there is no privity between the underlessee and the original lessor. The object of the statute was that protection should be given to the underlessee. The Conveyancing Act, 1881, had given protection to the lessee; but, it having been held that that section was not wide enough to cover the case of an underlessee, it became necessary to pass the Act of 1892, in order that underlessees also might have protection. At common law underlessees were always recognised to this extent—that if there was an existing lease, and then an underlease by the lessee, no surrender by the lessee to the lessor, and no arrangement made between the lessee and the lessor, was allowed to defeat or prejudice the interest or estate of the underlessee; and I think that this statute only carries that principle a little further. It is intended that forfeiture by the lessee acted upon by the lessor is not to defeat the right of the underlessee. It is to be observed that under s. 4 of the Conveyancing Act, 1892, the Court has power to make an order vesting, not the lease itself, but, "for the whole term of the lease or any less term the property comprised in the lease," or any part thereof, in the underlessee, "upon such conditions, as to the execution of any deed or other document"—that gives the power to order the landlord to make a new lease—"payment of rent" (which may mean, probably, but I do not say necessarily, and we need not

decide it, the payment of the intervening rent or mesne profits), "costs, expenses, damages, compensation, giving security, or otherwise, as the Court, in the circumstances of each case, shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease." Now, those are the words which define the conditions upon which the Court may give relief to a person entitled as under-lessee. In my judgment, the words do not entitle the Court to say, "We think that this property in the market is worth so much a year, and therefore we direct that a lease shall be granted at so much." I do not think that that is the meaning of the section; but here we have not got that case to deal with, because, there having been a forfeiture of Combe & Co.'s lease, the lessors at the present moment not only have vested in them their own rights as lessors, but must be treated for the purpose of s. 4 of the Act of 1892 as having vested in them also the rights of the lessee under the lease which has been forfeited; and it seems to me to be right and proper that the Court, in fixing what rent is to be paid for the future by the underlessee, should bear in mind that it is dealing on the one hand with the rights of the underlessee, and on the other hand with a person who is not only the original lessor, but who, by virtue of the forfeiture which he has enforced against the lessee, is for the purpose of this section entitled to be treated as having vested in him all the rights of the lessee. The underlessee cannot ask to have the lease treated as non-existent because it is gone in law and at the same time ask to have it treated as the source of his underlease. He must for these purposes treat the lessor as having vested in him the rights of the lessee. Under those circumstances it seems to me that it was right for Kekewich J. to make the order which he did. I am not saying what may be the exact circumstances which will have to be taken into consideration upon the inquiry, but, according to my view, whenever an inquiry of this kind is taken it ought to be upon the basis that there is a lessee who is liable to conform to the terms of the underlease, and that there is a lessor who now has the right to enforce as far as possible the rights of the

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original lessee. In this particular case that cannot be done, because there is this strange state of things: there is a rent of 800*l.* a year reducible to 300*l.* a year if the underlessee takes all his beer from a particular firm; and under those particular circumstances it does seem that there must be some inquiry to ascertain what is the fair rent at which the underlessee ought now to hold the premises. I think that in this particular instance the order is right; but, apart from the difficulties of this case, I should have said generally that, where a lessor has a right of forfeiture against his lessee, and that forfeiture has been enforced, the lessor ought to be treated as a person entitled to all the rights of the lessee.

ROMER L.J. Having regard to the decision in *Horsey Estate, Limited* v. *Steiger* (1), the only point of substance which is now open to this Court on this appeal is the question as to the terms upon which the rent of the new lease that has to be created as between the lessors and the underlessee should be fixed. I think that in this case Kekewich J. has come to a right conclusion; but as there is a question of principle involved as to the way in which s. 4 of the Conveyancing Act, 1892, should be dealt with, I think that it will be right that I should add the following remarks to what has already fallen from my brethren.

In the first place, it is to be borne in mind that all the rights of the company—the intermediate lessors—in the demised premises have gone. They have ceased to exist; and I am dealing in my general remarks with a case of that kind—a case where a right of forfeiture by the original lessor as against the intermediate lessor has been upheld by the Court, and determined in favour of the original lessor. The effect of the plaintiffs having succeeded in their action of forfeiture as against the company has been that, subject to any claims which the underlessee may make under s. 4 of the Conveyancing Act, 1892, the whole of the rights in the demised premises belonged to the plaintiffs, the freeholders. We start with that view, which is clearly a correct one. The underlessee has no

(1) [1899] 2 Q. B. 79.

right apart from what is given to him by s. 4; and when he comes to apply to the Court under that section he does so at a time when the plaintiffs have to be regarded as the absolute freeholders, and when any rights which might be said to have existed as between the company and Fryer in favour of the company, if they could be said to exist at all, belong really to the plaintiffs. Now, s. 4 of the Act of 1892, in my opinion, ought not to be cut down or unduly hampered by giving a restricted meaning to each word that is used in it. The section is to my mind purposely framed generally, so as to give the utmost liberty to the Court to do what is just as between the parties. I think that the section gives the most ample discretion to the Court to say upon what conditions and terms the property comprised in the original lease should be vested in the underlessee—a discretion absolutely unfettered by any limitation, except that contained in the words at the end of the section. That section did not, to my mind, of necessity contemplate that the terms of the original lease should be kept alive, either all or any of them, though, no doubt, speaking generally, regard would be had to them, and most of them probably would be kept alive in the new lease that had to be fixed as between the original lessor and the underlessee; but, as a matter of fact, it is not necessary that in the new lease there should be inserted any term of the original lease. The section is perfectly general. For example, the Court is not bound to give to the lessee the whole of the term of his underlease. Probably it generally would do so, but it is not bound of necessity to do it. It is bound to have regard to the words at the end of the section, and not to give him a longer term than the term of his underlease. The terms of the lease with respect to the covenants and so forth are, in my opinion, left open to be dealt with according to what is thought just by the Court, having regard to all the circumstances. That is contained in the provision as to the execution of any deed or other document which the Court shall think fit. Then there are these important words—"payment of rent, costs, expenses, damages, compensation, giving security or otherwise." Does that mean that the Court is restricted in saying what rent

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shall be the rent of the new lease? In my opinion, No. It does not follow that the rent must of necessity be either the rent fixed by the original lease or the rent fixed by the underlease. It is to be such a rent as will do justice between the parties under the circumstances. For example, it would clearly be inequitable in some cases to say that the rent must of necessity be the rent of the original lease. Take the case where the original lease was at a rent of 50*l.* and the underlease at a rent of 150*l.*—would it be equitable that, because of the forfeiture of the original lease at the instance of the original lessor, and the abolition of the original rent, the underlessee at a rent of 150*l.* should be entitled to say, "Now I ought to have the rent in my lease reduced from 150*l.* to 50*l.*"? To my mind, clearly not. It must not be forgotten, as I have already said, that when the underlessee comes to the Court for assistance he does so on the footing that the original lessee's rights are gone in favour of the original lessor.

Neither would it be fair in every case to fix the terms of the new lease by reference to the terms of the underlease. Take a case where the original lease was at a rent of 150*l.* and the underlease at a rent of 50*l.*: clearly it would be unfair in that case to fix the rent by reference to the rent of the underlease. The landlord should not be obliged to give up his rent of 150*l.* in exchange for the lesser rent of 50*l.* The Legislature has taken care not to hamper the Court. It has taken care to give to the Court the fullest powers of adjusting matters, and doing what is right when the whole circumstances of the case are regarded. Those circumstances would involve the terms of the original lease, the terms of the underlease, the circumstances of the forfeiture, what has been caused by the forfeiture, and the position of the parties generally. If the underlessee is by his new lease in substantially no worse a position than that which he occupied before the forfeiture, he certainly cannot complain.

Take the present case. In fixing the rent of the new lease, one cannot simply rely upon either the rent of the original lease or the rent of the underlease. One cannot fix it at the whole rent of the underlease, 800*l.*, because that, to my mind,

would be unfair to the underlessee; neither could one fix it at 300*l.*, because, in my opinion, that would be unfair to the lessor. If the rent were fixed at 300*l.*, that would be really taking away some of the property of the landlord, and giving it for no consideration to the underlessee. The underlessee a a rent fixed at 300*l.* would be getting a pecuniary advantage by the forfeiture of the original lease which he has, in my opinion, no right to. It is a question for the discretion of the Court looking at all the circumstances of the case, and I think the learned judge in the Court below has exercised his discretion fairly and properly. The right thing would be to say, "Let such a rent be fixed as, looking at all the circumstances of the case, would be the proper rent for this lease, including the terms of the underlease, but bearing in mind that the house is no longer a tied house, and cannot be made a tied house by the terms of the new lease." That is a condition of affairs which cannot be helped now, and must be grappled with.

In my opinion, looking at the whole circumstances of this case, the learned judge has exercised a wise discretion as between the original lessor and the underlessee, and this appeal must be dismissed.

Solicitors: *Bompas, Bischoff & Co.; Bolton & Co.*

G. I. F. C.

C. A.
1901
Feb. 6.

ARNOT *v.* UNITED AFRICAN LANDS, LIMITED.

[1900 A. 1776.]

Company — Special Resolution — Voting — Show of Hands — Declaration of Chairman that Resolution is Carried — "Conclusive Evidence" — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

By virtue of s. 51 of the Companies Act, 1862, the declaration of the chairman of a meeting of the shareholders of a company that a special resolution has been carried on a show of hands (a poll not having been demanded) is, at any rate in the absence of fraud, absolutely, and not merely primâ facie, conclusive of the fact that the resolution has been carried.

In re Hadleigh Castle Gold Mines, [1900] 2 Ch. 419, approved.

In re Horbury Bridge Coal, Iron and Waggon Co., (1879) 11 Ch. D. 109, explained.

Appeal by the plaintiffs, who were shareholders in the defendant company, and who sued on behalf of themselves and all other the shareholders, against the refusal of Kekewich J. to restrain the defendants, the company and their directors, from in any way acting upon some resolutions, which purported to have been passed as special resolutions at a general meeting of the company held on December 3, 1900.

The resolutions provided for the voluntary winding-up of the company and the sale of its assets to a new company, which was to be formed, in consideration of shares in that company.

The plaintiffs alleged that the resolutions were not in fact passed, and that there was so much confusion at the meeting that it was impossible for any one to understand what resolutions were put by the chairman to the meeting. Upon the evidence the Court of Appeal came to the conclusion that the chairman had put the resolutions to the meeting properly, and had declared that they had been duly carried, and that a poll had not been demanded. A minute to this effect was entered in the company's books.

By the writ in the action the plaintiffs claimed a declaration that the resolutions were not in fact passed at the meeting, but that a resolution for the adjournment of the meeting was

in fact carried; and an injunction to restrain the defendants from in any way acting upon the resolutions as if passed.

Another objection raised by the plaintiffs was that the resolutions (if passed) were ultra vires, but it is considered unnecessary to report the case upon this point.

By clause 47 of the company's articles of association, "At any general meeting, unless the chairman of the meeting shall require, as he shall have power to do, the votes to be taken by a poll, or unless a poll be demanded in writing by at least three members present in person or by proxy and entitled to vote at such meeting, and holding shares to the nominal amount of at least 1000*l.*, every resolution shall be decided by a majority of votes of the members actually present in person or by proxy, each member being considered as having only one vote, and such vote shall be taken by show of hands; and in case there shall be an equality of votes the chairman of the meeting shall be entitled to a casting vote, in addition to his original vote as a member; and a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of its having been carried, without proof of the number of votes recorded in favour of or against such resolution."

A. R. Kirby, for the plaintiffs, contended that the evidence shewed that the resolutions had not been duly passed as special resolutions.

J. W. Manning (*Warrington, K.C.*, with him), for the defendants. By s. 51 (1) of the Companies Act, 1862, the

(1) By s. 51, "A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any meeting mentioned in

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declaration of the chairman that a resolution has been carried is made "conclusive evidence of the fact" unless a poll is demanded. That section deals with special resolutions, and when the chairman said that the resolutions had been duly carried that implied that they had been carried as special resolutions. That this is the proper construction of s. 51 is shewn by *In re Gold Co.* (1) and *In re Hadleigh Castle Gold Mines.* (2) The evidence shews that some of the shareholders who were present at the meeting abstained from voting because they knew that the directors held such a large number of proxies that the resolutions would have been easily carried upon a poll.

A. R. Kirby, in reply. In the cases referred to, *In re Horbury Bridge Coal, Iron and Waggon Co.* (3) was not cited, and the observation there made by Jessel M.R. (4), "sufficient evidence in the absence of evidence to the contrary, but not conclusive evidence," seems to shew that the declaration of the chairman is only primâ facie conclusive, and if there is evidence that the chairman was mistaken, the Court may consider that question.

RIGBY L.J. Two questions are raised on this appeal. It is said that there is evidence which ought to induce the Court to come to the conclusion that the resolutions in favour of the scheme were not properly put to, or at any rate not duly passed by, the meeting. There is a good deal of contradiction in the affidavits, and I have no doubt there is a good deal of exaggeration, it may be, on both sides, but, as the result of the whole evidence, I consider that Kekewich J. has arrived at the right conclusion, namely, that the chairman did put to the meeting the resolutions, due notice of which had been given, and which had to be carried as special resolutions before the scheme could go on effectively, and that he did declare

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this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same. . . ."

(1) (1879) 11 Ch. D. 701; 48 L. J. (Ch.) 281, 286.

(2) [1900] 2 Ch. 419.

(3) 11 Ch. D. 109.

(4) 11 Ch. D. 114.

that those resolutions were carried, and that, no poll having been demanded, an entry of that declaration was made in the books of the company. That being so, we must, upon the authority of *In re Gold Co.* (1) and *In re Hadleigh Castle Gold Mines* (2), in which the former case was followed and explained, hold that the direction of the chairman is conclusive that the resolutions were in fact duly passed. That will preclude any inquiry into the number of shareholders who voted for or against the resolutions, for under the regulations of the company it is not necessary to inquire into the proxies.

It may be that there were a majority present at the meeting who were opposed to these resolutions (I do not know whether that was so, but there is a possibility of it), but if there were they recognised that their opposition was unavailable from their knowledge that there were a large number of proxies in the hands of the directors which would be used to overrule their opposition. However that may be, in my opinion the resolutions were duly declared to be passed, and they must be taken to have been passed by the requisite number of shareholders. [His Lordship then dealt with the other point, and continued:—]

The result is that, in my opinion, the appeal must be dismissed, and under the circumstances I think that the appellants ought to pay the costs.

VAUGHAN WILLIAMS L.J. I entirely agree. I wish to add a word about s. 51. It has been suggested that *In re Horbury Bridge Coal, Iron and Waggon Co.* (3) is an authority that, although in s. 51 the word used is "conclusive," it is not to be read as absolutely conclusive, but merely as primâ facie conclusive. I cannot agree in that view, and I think that when that case is examined it is clear that it decides nothing of the sort. The interlocutory observation of Jessel M.R. (4) had reference, not to the words of s. 51, but to clause 37 of the articles of association of that particular company. He was not dealing with s. 51 at all; and when one looks at the short statement of facts made by him the whole thing is quite plain.

(1) 11 Ch. D. 701.
(2) [1900] 2 Ch. 419.
(3) 11 Ch. D. 109.
(4) Ibid. 114.

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The question was whether a Mr. Kippax had been properly elected liquidator, and Jessel M.R. said (1): "The facts are for this purpose beyond controversy. There were five persons present corporeally. One of the five held what was called a proxy, but it has been admitted, for the purpose of the argument, by the respondents that that is not to be taken into account. Of the five persons present two only voted for Mr. Kippax. Three voted against him. The two who voted for him held more shares in the company than the three who voted against him, and according to the law of this company there was a vote for every share. No poll was demanded, and consequently no poll was taken. The next point is, whether the chairman was right in deciding that Mr. Kippax was duly elected because the two persons, including himself, who voted for Mr. Kippax held more shares in the company than the three who were against him. I think he was not." And Bramwell L.J. said (2): "First, a poll was not demanded, and, secondly, there was no waiver of a poll." Under those circumstances it seems to me that that case does not affect the question of the meaning of the word "conclusive" in s. 51.

STIRLING L.J. I am of the same opinion. As regards s. 51 I entirely agree with the reasoning of Cozens-Hardy J. in *In re Hadleigh Castle Gold Mines.* (3) In *In re Horbury Bridge Coal, Iron and Waggon Co.* (4), it appears that s. 51 did not come in question at all. The statement of the facts is this (5): "The company being in difficulties, a meeting was held, which had been summoned for the purpose of passing an extraordinary resolution under the Companies Act, 1862, s. 129, that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same." To that resolution of course s. 51 would apply. But what happened was this: "Five shareholders only attended, and a resolution to the above effect was passed unanimously." That resolution having been unani-

(1) 11 Ch. D. 114.
(2) Ibid. 116.
(3) [1900] 2 Ch. 419.
(4) 11 Ch. D. 109.
(5) 11 Ch. D. 111.

mously passed, they proceeded to appoint a liquidator, and for that purpose a special resolution was not required. "A motion was made and seconded that Kippax should be appointed liquidator. An amendment was moved that Masterman should be appointed," and there was a dispute as to the voting on that. The chairman decided that the original motion was carried. Sect. 51 did not apply to that resolution, but clause 37 of the company's articles of association did apply, and by that clause the chairman's declaration and an entry to that effect in the company's book was to be "sufficient evidence of the fact"; and not conclusive evidence as in s. 51. That case, therefore, is not an authority contrary to our present decision.

Solicitors: *Armitage & Chapple; Blair & W. B. Girling.*

W. L. C.

In re DE FALBE. WARD *v.* TAYLOR.

[1900 D. 127.]

Fixtures—Tapestries—Right of Removal—Tenant for Life and Remainderman—Costs—Shorthand Notes of Judgment.

Chattels (such as tapestries) affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels are, as against the remainderman, removable by the tenant for life, or by his executor after his death, even though they have been fixed as firmly as they would have been if it had been intended to annex them permanently to the freehold.

The purpose of the annexation is to be inferred from the circumstances of each case.

Tapestries purchased by the tenant for life of freehold estates were affixed by her to the walls of the drawing-room in the mansion-house. Strips of wood were placed over the paper which covered the walls, and were fastened by nails to the walls. Canvas was then stretched over the strips of wood and nailed to them, and the tapestries were then stretched over the canvas and fastened by tacks to it and the pieces of wood. Mouldings, resting on the surface of the wall and fastened to it, were placed round each piece of tapestry. Portions of the walls which were not covered by the tapestries were covered with canvas which was coloured or painted so as to harmonise with the tapestries:—

Held, that the tapestries had been thus affixed for the purpose of ornamentation and the better enjoyment of them as chattels, and that on the

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death of the tenant for life they did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life and could be removed by her executor:

Held, also, that the executor ought to pay the expense of making good the damage done in removing the tapestries, but that he was not bound to pay the cost of redecorating the room.

Decision of Byrne J. reversed.

Per Rigby L.J.: *D'Eyncourt* v. *Gregory*, (1866) L. R. 3 Eq. 382, disapproved.

Norton v. *Dashwood*, [1896] 2 Ch. 497, explained and distinguished.

The costs of a shorthand writer's notes of a judgment appealed from are included in the costs of the appeal without any special order of the Court.

APPEAL against a decision of Byrne J.

The question was whether some pieces of tapestry, seven in number, and said to be of large value, which had been purchased by Madame de Falbe, deceased, who was the tenant for life of the Luton Hoo estates in Hertfordshire and Bedfordshire, and had been affixed by her during her lifetime to the walls of the drawing-room of the mansion-house, formed part of her personal estate, or whether they had become attached to the freehold and had passed with it to the remainderman.

The executor of Madame de Falbe had removed the tapestries for the purpose of selling them. Upon a summons taken out on behalf of the infant tenant in tail of the estates, Byrne J., on the authority of *D'Eyncourt* v. *Gregory* (1) and *Norton* v. *Dashwood* (2), held that the tapestries had become attached to the freehold, and that they passed with it; and he ordered the executor to deliver them to a receiver of the freehold estates who had been appointed in another action.

The mode in which the tapestries had been affixed to the walls of the room was thus stated by Byrne J. in his judgment: "The whole of the room on the west side, and on the north side in that part of it where the most important piece of tapestry was fixed, was prior to the tapestries being put up, faced over the brick and plaster with wood permanently fixed by means of screws or nails, and this wood casing appears to be part of the permanent structure of the walls. The method of fixing the tapestries was as follows: Small slips of wood were nailed and screwed to the wooden casing of which I have

(1) L. R. 3 Eq. 382. (2) [1896] 2 Ch. 497.

spoken, or to the walls in some cases, and over these wooden slips canvas was stretched and nailed, and the tapestries were fastened to these wooden slips and over the canvas and were tacked on to the framework. Mouldings were fixed round all the tapestry, except the largest one, and, as regards the small one over the door, there were mouldings made to accord with the rest of the decorations of the room. Some of them were nailed with long nails to, and in some cases through, the wooden casing, and these nails even in some cases penetrated the plaster." The learned judge added: "The old decoration of the room consisted of a green and gold paper, with pilasters decorated and placed at intervals along that. It is true that the wall-paper was not stripped from the wall where the tapestries were put up, but the whole decoration of the room has been changed over this old paper, and there can be no doubt that, when the tapestries on the canvas are removed, the remaining old paper and pilasters would not form a convenient or appropriate decoration for the room as it now stands and is now decorated." "From some of the exhibits it clearly appears that the wooden mouldings which were used for fixing up these tapestries were penetrated by two-inch nails in some cases, and there can be no doubt that the tapestries where this moulding existed could not be removed without removing the mouldings themselves. Moreover, it is clear that in some instances nails penetrated, not merely the wooden portion of the wall, but went beyond that, and the marks of the plaster are still to be seen on some of the fastening nails."

The residuary legatee under the will of Madame de Falbe appealed.

Norton, K.C., and *T. L. Wilkinson*, for the appellant. It is submitted that the tapestries had not become fixtures attached to the freehold. They were merely placed as decorations of the room over the previously existing decoration. The tenant for life would have been entitled to remove them in the same way as a pier-glass or a picture hanging upon the wall. *D'Eyncourt* v. *Gregory* (1), the case on which Bryne J.

(1) L. R. 3 Eq. 382.

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principally relied, is distinguishable from the present case. There the ground of the decision really was that the house had been built for the tapestries, not that the tapestries had been fitted or fixed to the house. They were part of the architectural design of the house, as was said by Lindley L.J. and Lopes L.J. in *Viscount Hill* v. *Bullock*. (1) That cannot be said of the tapestries in the present case. At any rate, *D'Eyncourt* v. *Gregory* (2) is not binding upon this Court, and if necessary this Court can overrule it. *Norton* v. *Dashwood* (3) is also distinguishable. There the tapestry had stood on the walls of the house for at least a century. And, moreover, the decision was founded upon *D'Eyncourt* v. *Gregory*. (2) In *Lawton* v. *Lawton* (4) it was held that a fire-engine set up by a tenant for life for the benefit of a colliery passed on his death to his executor as part of his personal estate. There Lord Hardwicke L.C. said (5): "To be sure, in the old cases, they go a great way upon the annexation to the freehold, and so long ago as Henry VII.'s time, the Courts of law construed even a copper and furnace to be part of the freehold. Since that time, the general ground the Courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term. What would have been held to be waste in Henry VII.'s time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done." And in *Beck* v. *Rebow* (6) it was held that hangings, chimney-glasses, or pier-glasses were "only matter of ornament and furniture, and not to be taken as part of the house or freehold." These cases are subsequent to *Cave* v. *Cave* (7), in which it was held that "Pictures and glasses put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir, and not the executor." In *Dudley* v. *Warde* (8) it was held that a fire-engine erected by tenant for life or in tail to work a colliery was on his death part of his

(1) [1897] 2 Ch. 482, 483, 485.
(2) L. R. 3 Eq. 382.
(3) [1896] 2 Ch. 497.
(4) (1743) 3 Atk. 13.
(5) 3 Atk. 14.
(6) (1706) 1 P. Wms. 94.
(7) (1705) 2 Vern. 508.
(8) (1751) Amb. 113.

personal estate, and did not go with the estate to the remainderman. Lord Hardwicke L.C. said (1): "The case being between executor of tenant for life in tail (sic), and a remainded (sic) man, is not quite so strong as between landlord and tenant, yet the same reason governs it, if tenant for life erects such an engine." In *Squier* v. *Mayer* (2) it was "held that a furnace though fixed to the freehold, and purchased with the house, and also hangings nailed to the walls, shall go to the executor, and not to the heir." And in *Harvey* v. *Harvey* (3), "in trover by the executor against the heir, the Chief Justice held, that hangings, tapestry, and iron backs to chimneys, belonged to the executor."

In the present case the tapestries were not part of the architectural design of the house; they were merely decorative, and in taking them down no part of the walls has been removed. Only some of the mouldings, which were placed upon the surface of the walls, have been removed. The mere fact that the scheme of the decoration of the room was altered, so that it might harmonise with the tapestries, cannot render the tapestries fixtures if they would not otherwise have been so.

H. B. Howard, for the executor.

Levett, *K.C.*, and *Method*, for the remainderman. It is contended that the decision of Byrne J. was right. The tapestries were fixed to the walls in such a manner that they became part of the house. The intention of the person who put them up is immaterial. But they were fixed in the very mode in which they would have been fixed if it had been intended to make them part of the wall—in the most permanent manner possible. They were not fixed in the same way as pictures are; that which was done amounted to a complete alteration of the walls. The tapestries were set in a framework which was really part of the wall. In *Norton* v. *Dashwood* (4) Chitty J. laid down a general principle which applies to the present case.

[STIRLING L.J. referred to *Hallen* v. *Runder*. (5)]

The law on the subject is summed up in Williams on

(1) Amb. 114.
(2) (1701) Freem. Ch. 249.
(3) (1741) 2 Str. 1141.
(4) [1896] 2 Ch. 497.
(5) (1834) 1 C. M. & R. 266; 40 R. R. 551.

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Executors, 9th ed. p. 640 et seq. The present case falls exactly within what Lord Keeper Cowper said in *Cave* v. *Cave* (1) as to pictures and glasses "put up instead of wainscot, or where otherwise wainscot would have been put." Here an entirely new scheme of decoration for the room was adopted. If a new wall-paper had been substituted for the old paper, could the tenant for life have afterwards taken it away and sold it? He might no doubt remove the paper if in doing so he would not be committing waste, but he could not remove if it had a special or peculiar value. The law as to trade fixtures does not apply to such a case as the present. If the moulding had been fixed round an ordinary wall-paper, could the tenant for life have removed it?

[VAUGHAN WILLIAMS L.J. In that case the object of putting it up would have been clear.]

The present case cannot be distinguished from *D'Eyncourt* v. *Gregory* (2) or *Norton* v. *Dashwood.* (3) The decision in the latter case was founded upon *Cave* v. *Cave.* (1)

[VAUGHAN WILLIAMS L.J. *Cave* v. *Cave* (1) was cited in *Beck* v. *Rebow* (4), but it was not followed.]

There the mode of annexation was not similar to that in the present case. *D'Eyncourt* v. *Gregory* (2) was cited in *Viscount Hill* v. *Bullock* (5), and was not questioned. Neither was it questioned in the very recent case *Monti* v. *Barnes* (6), nor in *Bulkeley* v. *Lyne Stephens* (7), and it is submitted that it should not now be disturbed. In *Holland* v. *Hodgson* (8) Blackburn J. said (9): "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation

(1) 2 Vern. 508.
(2) L. R. 3 Eq. 382.
(3) [1896] 2 Ch. 497.
(4) 1 P. Wms. 94.
(5) [1897] 2 Ch. 482.
(6) [1901] 1 Q. B. 205.
(7) (1895) 11 Times L. R. 564.
(8) (1872) L. R. 7 C. P. 328.
(9) L. R. 7 C. P. 334.

and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: see *Wiltshear* v. *Cottrell* (1) and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory*. (2)" In the present case the tapestries were attached to the wall as firmly as possible, and the intention must have been to make them part of the freehold.

[VAUGHAN WILLIAMS L.J. In *Holland* v. *Hodgson* (3) the question arose between mortgagor and mortgagee. The result might have been different as between landlord and tenant.]

In *Lawton* v. *Lawton* (4) the question arose between tenant for life and remainderman, but the element of trade came into consideration. In *Beck* v. *Rebow* (5) the annexation was not like that in the present case. *Dudley* v. *Warde* (6) related to trade fixtures, and in it a distinction is made between the case of landlord and tenant and that of heir and executor. In that case also Lord Hardwicke points out that one consideration is, whether the house is the principal or only the accessory, and that if the so-called fixture is the principal, and the house is only the accessory, the walls may even be pulled down, if necessary, to get at the fixture. In the present case it is impossible to say that the house is only an accessory to the tapestries. *Squier* v. *Mayer* (7) and *Harvey* v. *Harvey* (8) are both very shortly reported, and there are no details shewing how the hangings, &c., were really fixed. Here the tapestries were fixed in such a manner as to form part of the mural decoration of the room, as a room, and were an actual part of the room itself. In all these cases the mode of fixing must be the chief consideration, and it is submitted that these tapestries, having regard to the mode in which they were fixed in panels in the walls, formed no exception to the general rule, that whatever is affixed to the freehold is part of it.

(1) (1853) 1 E. & B. 674.
(2) L. R. 3 Eq. 382.
(3) L. R. 7 C. P. 328.
(4) 3 Atk. 13.
(5) 1 P. Wms. 94.
(6) Amb. 113.
(7) Freem. Ch. 249.
(8) 2 Str. 1141.

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RIGBY L.J. The question arises between the tenant for life of an estate, which includes a mansion-house, and the infant tenant in tail in remainder. The tenant for life being dead, her claim is now represented by her executor, but it is not a case between heir and executor in the sense in which that has been dealt with by the authorities. The question is between the representative of the tenant for life, who stands in the same position as she herself had she been living would have stood, and the remainderman. As regards fixtures, we all know that the time was when everything affixed to the freehold was held to go with the freehold, and it was only by slow degrees that that unbending rule was modified, and came at last to assume the proportions which it now retains. For instance, in *Herlakenden's Case* (1) it is said that wainscot, in whatever way fastened to the posts or walls of the house, cannot be removed by the lessee. But in modern times there have come to be important exceptions to this rule, one being in favour of trade fixtures and entitling a person who has put up what are now called "fixtures" (which means removable fixed things) for the purposes of trade to remove them. That exception is not confined to the case of landlord and tenant, meaning thereby the owner of the immediate reversion and a tenant for years only. The exception extends equally, as is shewn by *Dudley* v. *Warde* (2), to the case of a tenant for life, and the person who comes into possession of the estate upon his death. There is another equally important and well-established exception from the rule, namely, in the case of articles which have been affixed to the freehold, not with the object of enhancing its value, but for purposes of ornamentation. Objects so fixed, as, for instance, chimney-glasses, are removable, and Mr. Levett was compelled to admit that in that case also the exception would apply not only as between landlord and tenant for years, but also as between a tenant for life and the remainderman or reversioner who takes the estate subject to the life tenancy. And if the exception applies to such a thing as a chimney-glass, I cannot see why it does not apply generally to all articles affixed for the purpose of enjoyment and ornamentation. I shall

(1) (1589) 4 Rep. 62 a, 64 a. (2) Amb. 113.

assume that it does. And then the question in the present case is reduced to this, whether these tapestries were so affixed as to become part of the house, or so affixed as to continue removable at the will and pleasure of the tenant for life who affixed them, or, failing her removing them during her lifetime, removable by her executor after her death. A great deal of time has been spent on the point how these tapestries were affixed to the walls. I daresay they were as firmly affixed as they would have been by a person who intended them to remain there always, but I do not think that is of much importance. Fortunately in such cases the Court is not driven to inquire whether the screws which fix an object to a wall are one inch or two or three inches long, whether there were half-a-dozen or a dozen of them, or whether they did or did not penetrate into the plaster of the wall. In all such cases the object (whatever it may be) which is affixed for the purposes of ornamentation is affixed to the freehold, but the exception allows it to be removed.

Numerous cases have been cited to us, amongst them *D'Eyncourt* v. *Gregory* (1) and *Norton* v. *Dashwood.* (2) As regards *D'Eyncourt* v. *Gregory* (1), I do not hesitate to say that I feel great difficulty, owing in part to what seems to me the very inconclusive reasoning of Lord Romilly M.R. in support of his decision. He speaks of paper and panelling and other such matters as if they concluded the case. Paper, he says, is part of the wall, and so no doubt it is, and he says it cannot be taken away by a tenant for life. That I question entirely. If there be on a wall a paper which the tenant for life does not like, I conceive that he has a right to take it away and to substitute another. He is under no obligation to wait until the first paper is worn out; but if it becomes distasteful or displeasing to him, or if another paper pleases him better, he may scrape away the earlier paper and put up another which he prefers. As regards panelling, I am by no means satisfied that the law has changed since Lord Hardwicke in *Lawton* v. *Lawton* (3) laid it down in 1743 that, whatever might have

(1) L. R. 3 Eq. 382. (2) [1896] 2 Ch. 497.

(3) 3 Atk. 13.

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been the rule originally, at the time at which he was speaking wainscot fixed with screws to the wall had become recognised as removable. Another instance which was referred to by Lord Romilly, namely, the upper grindstone of a mill, does not appear to me to be at all applicable. In my opinion the ruling as to the tapestries in that case cannot be maintained, unless it should turn out that there was some proof (of which I can find no trace in the report) that the house was fitted to the tapestry rather than the tapestry to the house, and in that way (although I do not say that even then it would be clear) it might be possible to support the decision, on the ground that the tenant for life who affixed the tapestry had shewn a plain intention to add it irrevocably and permanently to the house. At any rate, I think that the decision in *D'Eyncourt* v. *Gregory* (1) is not right if it would apply to such a case as the present, and for the purpose of this judgment, and so far as may be necessary, I must hold that the decision ought not to be followed.

Norton v. *Dashwood* (2) is also very different from the present case. There tapestries, which had for 100 years belonged to and formed part of the decoration of a mansion-house, were held under very special circumstances to have become attached to the house, and to be not removable by the executors of the tenant for life. I am not quite satisfied that the circumstances were sufficient to authorize that finding; but, at any rate, they were very different from the circumstances of the present case. Here the tenant for life purchased, it is said for a large sum, seven tapestries (which are called French tapestries) which, according to the evidence of experts in such matters, require to be stretched, and they were put up in the drawing-room. Accordingly, in a way which does not appear to be unusual, upright battens were put up along the walls, and across those battens canvas was nailed, and finally over the canvas the tapestries were fastened by very small tacks of such a nature as not to damage the material of the tapestry. As I understand, the tapestry was tacked all round, but this does not in the least matter. There might be many variations in the way of putting

(1) L. R. 3 Eq. 382. (2) [1896] 2 Ch. 497.

it up, but the tapestry was tacked all round to wooden supports which were brought there for the purpose, and round the edges mouldings were placed so that the tapestries were completely framed. There was something very much in the nature of a picture-frame round each piece of the tapestry. So far I can see no indication of anything but the natural intention of the owner of beautiful objects to set them up for the purpose of the ornamentation of the room, and I cannot recognise any distinction between ornamenting a room in part or in the whole. I think it is not unreasonable or unlikely that a tenant for life should wish the whole room to be ornamented in this way. At any rate, Madame de Falbe did set up all these tapestries so as to form together an ornament for the drawing-room. It was found that the tapestries, which were doubtless of a remarkable colour, did not harmonise with the green and gold paper which originally covered the whole or the greater part of the walls of the room, and some pillars were set up and between them panels were introduced, and were painted a buff colour so as to set off the tapestries more plainly. In this way it might appear to any one looking at the tapestries that they formed the centre of panels. But they were in fact simply resting in front of the paper, and the so-called panels put up at the side of them only filled up the space which was not occupied by the tapestries. It is said that by putting up the tapestries in this way they became part of the wall. I agree that in a sense they did; but it is all-important to ascertain what you mean by those words. The tapestries were a part of the wall in the sense that they were rigidly affixed to it, and no doubt they were affixed in such a way as in earlier days would have been held to make them inseparable parts of the wall. But the question is, whether they were not made "fixtures," meaning thereby objects fixed to the wall which might be removed at the will of the person who had fixed them. In my opinion they were of the last-mentioned character. I can see in what was done no indication of anything but the wish of the tenant for life to have what she considered, as they no doubt were, beautiful and valuable objects placed in such a position as might please the eye and satisfy her desire for

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ornament. I can see no reason why she should not retain the right to remove them.

The argument for the remainderman must amount to this, that the moment the tenant for life had placed those tapestries on the walls, she and every one claiming through her became absolutely bound to leave them there, and she might have been restrained by injunction from removing the tapestries as being part of the wall and of the building. I entirely dissent from that suggestion. It so happened that the tenant for life retained the tapestries on the wall during her life. It is conceivable that she might have fallen in with better specimens of tapestry, and, if she had done so, I think she would have been entitled at once to remove those which she had already fixed there in order to replace them by others, or she might, if she had been so minded, have taken them down for the purpose of selling them. And I do not think that the fact that she would have had first to take down the mouldings, and then to undo the fastening by tacks and nails, makes any difference. In my opinion she had a perfect right to remove the tapestries at any time, and that right passed to her executor. In fact, she made a bequest of these tapestries, and the legatee has appeared here to argue on his own behalf. The executor has also appeared and has supported the legatee, and I think they are in the right.

One or two other cases were cited by Mr. Norton to which I have not thought it necessary to refer. The case falls within the proposition that objects set up for the purpose of decoration or ornamentation are excepted from the rule that things fixed to the freehold belong to the owner of the freehold. On that broad ground I wish to base my decision.

VAUGHAN WILLIAMS L.J. I entirely agree. The question is as to the right of a tenant for life to remove some tapestries which had been affixed by her to the freehold. I do not say, and no one could say, that as a matter of history all the cases upon the subject of the removability of fixtures are absolutely consistent. Certainly they are not. But there is this amount of consistency in them, that, starting with the absolutely rigid

rule, "Quicquid plantatur solo solo cedit," there has been a consistent progress towards relaxation of that rule, and in my view there has never been any substantial intermission of that relaxation. The present case arises in effect between the executor of the tenant for life and the remainderman. The fact which is really the basis of my judgment is this. I have not the faintest doubt upon the evidence that these tapestries were affixed by the tenant for life to the freehold for the purpose of their enjoyment as chattels, and in no sense for the improvement of the freehold. In dealing with the question of fixtures it sometimes becomes material to consider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case.

Let us see how that question comes to be material. It will not be denied, and indeed it has not been denied in argument, that amongst the exceptions to the rigid rule, "Quicquid plantatur solo solo cedit," there are these two—one in respect of trade fixtures, the other in respect of ornamental objects, which have been annexed in some way to a freehold. Mr. Levett suggested that those exceptions apply only in the case of landlord and tenant. Here again is an instance of the progression of the law. There is some authority to shew that as regards trade fixtures it was at one time doubted whether the exception applied in any other case, if indeed it was not actually held that it did not. I do not think that is any longer the law, but no such question arises here. With regard, however, to ornamental fixtures, it seems to me that the authorities are substantially all one way. As early as 1701, in *Squier* v. *Mayer* (1), the exception in respect of ornamental fixtures was applied in favour of the executor as against the heir, and, whatever may be the position of a remainderman, it is at least no better than that of the heir. On the contrary, the heir is always supposed to be the most favoured by the law.

I do not consider it necessary to go in detail through the

(1) Freem. Ch. 249.

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various subsequent cases in which that exception has been applied. But I do say this, that, if the cases during the whole period since *Squier* v. *Mayer* (1) are looked at, it will be found that from time to time this exception or relaxation in respect of ornamental fixtures has been recognised, and it seems to me clear that it has been recognised in other cases than those between landlord and tenant.

That being so, it is impossible to say that the only matter to be taken into consideration is the quantum of fixture—how much and in what manner the chattel has been affixed to the freehold. No one, of course, would say that that is not a material fact to be taken into consideration. There might be such an incorporation of the chattel with the freehold that it would be impossible to deny that the chattel had become part of the freehold, and absolutely impossible to admit the exception. Therefore the quantum of fixture is important. But that is not the only matter which has to be taken into consideration. One must ask oneself, is there any more fixing than was necessary for the enjoyment of the chattel as such? If you fix a heavy object, such as a heavy ormolu clock, to the wall of a room, you may, in order to make it safe, have to use very substantial fixings. You may have to drive an iron bar right through the wall and to rivet it at the back. You might have to employ a mode of fixing which in many cases would be conclusive of an incorporation of the chattel with the freehold. But, the moment you come to the conclusion that the mode of fixing which was employed was absolutely necessary for the enjoyment of the chattel, that inference does not arise. So it seems to me in the present case. You wish to enjoy those expensive tapestries which you have bought, and the mode of enjoying them necessarily is to hang them on the walls of the house, and you wish to hang them in such a way that they will not be torn. If you drive nails through the tapestry into the wall you spoil the tapestry, and you make indelible marks all round the edges of the tapestry. Therefore, in order to avoid that, you put laths or thin pieces of wood against the wall, and then you are able to affix the tapestry to

(1) Freem. Ch. 249.

those thin pieces of wood in such a way as not to tear it, whereas if you use nails to affix the tapestry directly to the wall you must necessarily use much bigger nails and they would tear the tapestry. In my judgment it is obvious that everything which was done here can be accounted for as being absolutely necessary for the enjoyment of the tapestry, and when one arrives at that conclusion there is an end of the case. When the limitations of the exception to the general rule which Mr. Levett has suggested are disposed of, and the conclusion is reached that there was only such a fixing as was necessary for the enjoyment of the chattels, it seems to me that we are bound to decide this case in favour of the tenant for life or her executor.

I wish to say a word about *D'Eyncourt* v. *Gregory* (1) and *Norton* v. *Dashwood*. (2) I cannot find that either Lord Romilly M.R. or Chitty J. said anything which is inconsistent with the principle I have sought to apply in arriving at my judgment. Lord Romilly expressly said his conclusion was an inference which he drew from the particular facts of that case, and he said (3): "Unquestionably, in coming to these conclusions, I have not done so with any degree of confidence, or even of complete satisfaction to myself. The evidence, minute and clear as it is, cannot give the same effect that a personal examination might do; but even on a personal examination I should doubt whether I could come to a more accurate conclusion. The best conclusion I can come to with regard to the articles I have enumerated is, that they seem to me to belong to the freehold, and to be inseparable from it." In other words, Lord Romilly inferred from all the facts of that case that the tapestries were affixed as they were to the walls for the purpose of the improvement of the freehold, and not for the purpose of their enjoyment as chattels. It seems to me that *Norton* v. *Dashwood* (2) is capable of a precisely similar explanation.

STIRLING L.J. I am of the same opinion. The question arises in substance between the tenant for life and the remainderman,

(1) L. R. 3 Eq. 382. (2) [1896] 2 Ch. 497. (3) L. R. 3 Eq. 397.

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for it is admitted that the representative of the deceased tenant for life stands in the same position as she herself would have done. The question is whether these tapestries still form part of the estate of Madame de Falbe, the tenant for life, or whether they pass to the remainderman as annexed to the freehold.

Now undoubtedly the old rule of the common law was, that whatever became affixed to the freehold passed to the owner of the freehold; but modifications of that rule have been introduced from time to time. The first point which I think deserves consideration is, What is the ground on which that old simple rule has been modified? I find in the judgment of Martin B., in *Elliott* v. *Bishop* (1), a passage which expresses so exactly what I desire to say, that I prefer to read it rather than to use my own words. He said (2): "The old rule laid down in the old books is, that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he or his representatives can afterwards take it away, the maxim being 'Quicquid plantatur solo solo cedit': *Minshall* v. *Lloyd.* (3) But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'; and the best definition with which I am acquainted is that given in the judgment of this Court in *Hallen* v. *Runder* (4), namely, that they are articles which were originally personal chattels, and which, although they have

(1) (1854) 10 Ex. 496.
(2) 10 Ex. 507.
(3) (1837) 2 M. & W. 450; 46 R. R. 638.
(4) 1 C. M. & R. 266; 40 R. R. 551.

been annexed to the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them." It will be observed that the learned judge says the rule has been relaxed in favour of both tenants for life and tenants for terms of years, and that the objects in regard to which the old rule has been relaxed are those which have been affixed to the freehold "for the more convenient or luxurious occupation of houses, or for the purposes of trade." It is not disputed that, as between landlord and tenant, chattels annexed to the freehold for the purposes of trade have long been included in this exception to the rule. Nor can it be disputed that in recent years, whatever may have been the case in former times, objects which have been affixed to the freehold by way of ornament have been held as between landlord and tenant to fall in the same category. That point was considered in that very case, *Elliott* v. *Bishop* (1), and it formed the subject of an elaborate judgment by Coleridge J., who delivered the judgment of the Court of Exchequer Chamber on appeal: *Bishop* v. *Elliott.* (2) He cited (3) the following passage from the judgment of Dallas C.J. in *Buckland* v. *Butterfield* (4): "In the progress of time this rule has been relaxed," (that is, the old rule "Quicquid plantatur solo solo cedit") "and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like." So that it is clearly established, as between landlord and tenant, that ornamental objects are included in the exception. Is there, then, any reason why, if ornamental objects are, as between landlord and tenant, included in the exception, they should not be included in it as between tenant for life and remainderman? If we look at the origin of the exception, as stated in the passage which I have just read, it seems to me there can be no reason. The origin of the exception is stated to be, to prevent the injustice of denying the tenant, either for life or for years, the right to remove the ornamental objects at his pleasure, and so practically forfeiting

(1) 10 Ex. 496.
(2) (1855) 11 Ex. 113.
(3) 11 Ex. 120.
(4) (1820) 2 Brod. & B. 54, 58; 22 R. R. 649.

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valuable and expensive articles to the owner of the freehold. If that be the ground of the exception as between landlord and tenant, I fail to see why it is not an equally good ground for its application as between tenant for life and remainderman. So far as authority goes, we find the matter in this position. Lord Hardwicke, in the year 1751, dealing with a case of trade fixtures, in *Dudley* v. *Warde* (1), said: "The case being between executor of tenant for life in tail, and a remainded man, is not quite so strong as between landlord and tenant, yet the same reason governs it." Therefore, as regards trade fixtures, he treated the rule as being the same in the cases of landlord and tenant and tenant for life and remainderman.

In the earlier case, *Lawton* v. *Lawton* (2), which was decided in 1743, and was also a case of trade fixtures, Lord Hardwicke referred to the case of ornamental fixtures and treated them as governed by the same rule. He pointed out that in the old cases, and so long ago as Henry VII.'s time, the Courts of law construed even a copper and furnaces to be part of the freehold. But he continued: "Since that time, the general ground the Courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term. What would have been held to be waste in Henry VII.'s time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done." I read that as referring to ornamental objects, and as shewing that in Lord Hardwicke's opinion ornamental fixtures stood in the same position as trade fixtures, both as between landlord and tenant and as between tenant for life and remainderman. It appears to me, therefore, both on principle and on authority, that the exception from the rule extends to ornamental fixtures as well as to trade fixtures.

Now, what are the objects as to which the dispute arises here? Tapestries. Photographs of some of them have been produced, and they shew that the tapestries are of an ornamental character, and, therefore, it appears to me that the exception from the rule applies. But I do not wish to rest my

(1) Amb. 113, 114. (2) 3 Atk. 13, 14.

judgment entirely on that. Cases which are less favourable to the right to remove fixtures are those between heir and executor, between vendor and purchaser, and between mortgagor and mortgagee. In those cases no question of injustice arises; there is no injustice—no forfeiture of any property—when a man who is owner in fee affixes his own chattels to the freehold. But, even as between heir and executor, the question may arise whether things which were originally chattels have or have not become part of the freehold. And, as was pointed out by Blackburn J. in one of the most recent cases on the subject, *Holland* v. *Hodgson* (1), the question what constitutes an annexation sufficient to make the chattel part of the land "must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation." Blackburn J. gave various examples in which the degree of annexation might be material. As regards the object of the annexation the question to be considered is, whether the object is to improve the freehold to which the annexation is made, or whether it is the more complete and better enjoyment of the chattel itself. Here the chattels to be enjoyed are some pieces of tapestry. How are they to be enjoyed? They must be placed so as to be seen by the eye, and in order that they may be properly seen they must, as they are large pieces of tapestry, be placed in a large room. Madame de Falbe put them into the best room in the house, the drawing-room. She affixed them, no doubt, to the walls of the room, but she did this in such a way that the tapestries might be removed without any structural damage. I do not mean that in removing them there may not be some injury to the plaster, and so forth, but nothing would have to be altered in the structure of the house. Nor was anything in the structure of the house really altered when the tapestries were put up. Some additions were made to the tapestries in the shape of canvas which was painted or dyed a suitable colour for the enjoyment of the tapestries, so that the accompaniments might not be an eyesore to the beholder. Looking at the evidence as to the mode in which the tapestries were affixed

(1) L. R. 7 C. P. 328, 334.

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and the position in which they were placed, I feel no doubt that everything which was done was done for the better enjoyment of the tapestries as chattels, and not for the purpose of making an addition of some thousands of pounds to the value of the mansion-house. In my opinion this case falls within both the lines of decision to which I have referred. I agree, therefore, in the conclusion at which my learned brothers have arrived, and I think that the appeal ought to be allowed.

Levett, K.C. The remainderman is entitled to be recouped the expense of redecorating the walls and repairing the injury caused by the removal of the tapestries: Amos and Ferard on Fixtures, 3rd ed. pp. 123, 124. An inquiry should, therefore, be directed on this point.

[Stirling L.J. referred to *Elliott* v. *Bishop*. (1)]

Rigby L.J. As regards the injury alleged to have been caused to the walls by the removal of the tapestries, there has been no waste in respect of which the remainderman has a right to compensation. In taking down the tapestries some trifling damage may have been done to the walls, but I do not think the damage can be such as to make it worth while to direct an inquiry, though the damage, amounting probably to not more than a few shillings, ought to be allowed for or made good by the executor. I do not agree that the respondent should have consequential damages for redecorating the room. It is not waste to remove one set of purely decorative ornaments to make room for another. The order of the Court below will be discharged, and there will be a declaration that the tapestries are chattels and belonged to the testatrix. The appellant will have his costs both here and in the Court below.

Vaughan Williams and Stirling L.JJ. concurred.

Norton, K.C. The costs will include the costs of the short-hand notes of the judgment below.

Rigby L.J. We have said over and over again that no special order is necessary. Not only will we make no order

(1) 10 Ex. 496, 507; 11 Ex. 113.

that the costs of the shorthand notes be allowed, but we will say nothing about them.

Norton, K.C. The taxing masters refuse to allow these costs unless they are specially ordered.

RIGBY L.J. We say nothing about them. Our rule is well known.

Solicitors: *Hadden-Woodward & McLeod; Payne, Shaw-Mackenzie & Co.; Rowcliffes, Rawle & Co.*

W. L. C.

LEVER *v.* KOFFLER.

[1900 L. 1693.]

Specific Performance—Written Offer containing Two Alternatives—Verbal Acceptance of One—Agreement to Let from Year to Year—Statute of Frauds, s. 4.

Verbal acceptance of one of two alternatives contained in a written and signed offer is sufficient to constitute an enforceable contract as against the writer.

Dictum of Earl Cairns L.C. in *Hussey* v. *Horne-Payne*, (1879) 4 App. Cas. 311, 317, discussed and followed.

Specific performance of an agreement to let from year to year will be enforced.

Clayton v. *Illingworth*, (1853) 10 Hare, 451, and *De Brassac* v. *Martyn*, (1863) 11 W. R. 1020, considered.

ACTION for specific performance of an agreement whereby the defendant agreed to let to the plaintiff certain premises upon the terms mentioned in a letter or memorandum addressed to the plaintiff, and signed by the defendant's authorized agent.

By a memorandum in writing dated April 12, 1900, signed by J. M. Porter, the authorized agent of the defendant, the defendant offered to let to the plaintiff certain premises known as "Minydon," comprising a messuage and about eight acres of land situate near Colwyn Bay, North Wales, upon an annual tenancy at the rent of 150*l.*

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The memorandum was as follows: "Dear Sir.—Re Minydon. —I interviewed the owner this morning, and after a lengthy discussion with him got him to agree to the following proposal, which is firm and will be open for your consideration up to Thursday next at 12 noon. He will let you the place upon an annual tenancy only at the rent of 150*l.*, and will allow 20*l.* towards decorating, &c. Should the owner require possession and serve you with notice to quit at the end of the second year he will allow you the sum of 50*l.* as compensation for disturbance; third year, the sum of 30*l.*; fourth year, 25*l.*; fifth year, 20*l.* Immediate possession would be given. Tenancy to commence at Midsummer.

"He will sell you the residence, outbuildings, garden, and grounds, the whole covering the area of four acres only . . . . at the price of 5000*l.* Mortgage of 4000*l.* at 4½ per cent. can be left on. This proposal also is open for your consideration up to Thursday next at noon. The owner will not grant any option of purchase in the tenancy agreement."

On the following Thursday, April 19, within the time fixed by the letter of April 12, the plaintiff saw J. M. Porter, and verbally accepted the offer of Minydon, and also wrote a letter to him which was as follows: "Referring to your offer of Minydon of the twelfth April, I hereby accept same on the conditions named therein. Yours faithfully. Ellis Lever."

The defendant having repudiated the agreement contained in the above letter and refused to carry out the same, this action was commenced.

Hewitt, for the plaintiff. This is not a yearly tenancy. It is a tenancy for one year certain, and so on from year to year: *Doe* v. *Green* (1); *Doe* v. *Smaridge*. (2) Specific performance of an agreement to let on an annual tenancy will be enforced: *De Brassac* v. *Martyn*. (3)

Rowden, K.C., and *Gatey*, for the defendant. A memorandum in writing containing two or more alternative offers of which only one is to be accepted does not satisfy s. 4 of the

(1) (1839) 9 Ad. & E. 658. (2) (1845) 7 Q. B. 957.
(3) 11 W. R. 1020.

Statute of Frauds, because from a perusal of the memorandum alone it does not appear what was the contract ultimately made. In order to see what the real contract was, it is necessary to read the acceptance, or to have evidence of what were the terms of the acceptance if it was oral. The memorandum does not contain the terms of a complete agreement, as required by *Munday* v. *Asprey*. (1) It is ambiguous, and requires parol evidence to complete it.

The result is that the evidence against the defendant must consist of two parts—first, the memorandum, which does not prove what the contract was; and, secondly, the acceptance which supplements it, but is not signed by the defendant, and is, therefore, not admissible under the Statute of Frauds.

Specific performance of an agreement for an annual tenancy will not be enforced: *Clayton* v. *Illingworth*. (2)

Hewitt, in reply.

Cur. adv. vult.

Feb. 20. BYRNE J., after stating the facts, proceeded:—It is clear both on the verbal and written acceptance that the plaintiff accepted the offer to let.

The points raised by way of defence are, first, the Statute of Frauds. It is said there is no agreement in writing or memorandum or note of the terms signed by the defendant or his agent sufficient to satisfy the statute. The defence is put in two ways: first it is said that, an alternative offer having been made, the reply does not define which alternative is accepted. I think it does. There is an offer to let "Minydon"—that is, the whole, the house and eight acres of land, or to sell part of it. The acceptance is of the "offer of Minydon"—that is, the whole of it. There was but one offer of "Minydon," and that was accepted. Again, it is said that inasmuch as the letter containing the offer contains two offers, the memorandum signed by the defendant does not contain the terms, and it was argued that if a man offers in writing to sell Nos. 1 and 2 in a particular street or either house at a separate named price, and there is an acceptance of the offer so far as regards No. 1, the

(1) (1880) 13 Ch. D. 855. (2) 10 Hare, 451.

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contract is not sufficiently evidenced in writing. No authority was cited for this proposition, and it was said that none could be produced. I reserved judgment until this morning out of respect for the forcibly urged argument of counsel on the point. The question being one about a contract by letters, I referred to *Hussey* v. *Horne-Payne*. (1) In that case Mrs. Horne-Payne stated by letter that she was willing to divide the difference between an offer which had been made to her and the price she had asked and to accept the sum of 37,500*l*. for the entire freehold property at North End, or 34,000*l*. for the property without the Mornington House and one and a half acre of ground. The answer was in these words: "I beg to acknowledge the receipt of your letter of the 4th inst., stating that you are willing to accept the sum of 37,500*l*. for the whole of your freehold land at North End (including the Mornington House estate), and I hereby accept your terms as above." On those two letters Earl Cairns says this (2): "I should say that if these two letters were the only information which your Lordships had upon the subject—if the matter had ended here as it began, with these letters—I should have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the Statute of Frauds. There is property named, there is a price to be paid, and there is the name of the vendor and of the purchaser."

That is only a dictum, but it is one containing a clear expression of opinion, and one which I am content to follow. It agrees entirely with the view I had previously formed.

The next defence is that specific performance will not be decreed of an agreement for a tenancy from year to year. I do not think that the present one is such an agreement, as I consider it expresses an agreement which is not determinable before the end of the second year. This point is from lapse of time now immaterial except as bearing upon the supposed rule. In support of the contention the case of *Clayton* v. *Illingworth* (3) was cited. But in that case it was decided that there was a sufficient agreement in law, and that the execution of

(1) 4 App. Cas. 311. (2) 4 App. Cas. 317.
(3) 10 Hare, 451.

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another instrument was not required. It would only have put the tenant to useless expense.

The case, however, of *De Brassac* v. *Martyn* (1) clearly recognises the right to specific performance in the case of a still shorter tenancy in a proper case. It appears to me that although specific performance is a discretionary remedy, it will be granted even in the case of a very short term in a proper case. I think this is a proper case, and I shall therefore make a decree for specific performance.

Solicitors: *Belfrage & Co., for Chamberlain & Johnson, Llandudno; Hamlin, Grammer & Hamlin, for Gamlin & Williams, Rhyl.*

G. M.

COZENS-HARDY J.
1901
Jan. 21.

In re MÉGRET. TWEEDIE *v.* MAUNDER.

[1900 M. 071.]

Conflict of Law—Domicil—Personal Property—Settlement—Power of Appointment—Will.

On the marriage of an Englishwoman with a domiciled Frenchman, English personal property was settled in English form with English trustees on such trusts as the intended wife should by will appoint, and subject thereto for her separate use:—

Held, that the settlement was governed by English law, and that, subject to the payment of separate debts of the wife, the settled property passed under the will of the wife notwithstanding limitations imposed by French law on testamentary disposition.

THIS was the argument of a question, raised on petition and summons, as to the effect of the will of a domiciled Frenchwoman on personal property the subject of an English settlement.

The question was whether the French law, which (as was admitted) provides that part only of a person's property may be disposed of by will if the testator has issue living (2), prevented the complete exercise of the power.

In April, 1862, a marriage was solemnized in England

(1) 11 W. R. 1020. (2) Cod. Nap. 913, 914.

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between Louis Nicholas Adolphe Mégret, a domiciled Frenchman, and Rachel Adelaide Davis, widow, a domiciled Englishwoman. In contemplation of the marriage a settlement of personal property belonging to the intended wife was executed. The settlement was in English form, the trustees were English, and the property subject to it was and remained English. The settlement contained a covenant to settle after-acquired property. The settlement gave the wife a general testamentary power of appointment over the settled property, which was given to her for her separate use in default of appointment.

There was issue of the marriage four children, a son and three daughters, all living.

Madame Mégret made a will, dated February, 1876, in English form and executed according to English legal requirements, whereby she appointed the whole of the trust funds in favour of her four children, settling the daughters' shares. She made a codicil appointing her husband a life interest in the settled property, otherwise confirming her will. She died on July 22, 1899, in England, where she was residing for the time. The husband, Louis Nicholas Adolphe Mégret, was still resident in France. The executors appointed by Madame Mégret renounced, and letters of administration with the will annexed were granted to Mr. Tweedie, the plaintiff in the summons, as attorney to M. Mégret, the husband. Madame Mégret had contracted certain debts which it was admitted by those claiming under the appointment had to be discharged, so far as her other property was insufficient, out of this trust property.

Eve, *Q.C.*, and *Errington*, for the husband and his attorney, the administrator.

Vernon Smith, *Q.C.*, and *J. G. Wood*, for the son. The effect of the settlement was to put the property in the same position as it would have been if it was her own absolutely and for all purposes: *London Chartered Bank of Australia* v. *Lemprière*. (1) Her domicil being French, she can only dispose of a portion of her property; her husband and children are entitled under French law to a part.

(1) (1873) L. R. 4 P. C. 572.

In re Hernando (1), *In re Price* (2), *Pouey* v. *Hordern* (3), and *In re Bald* (4) are distinguishable, because in those cases there was either a special power or no gift over to the donee of the power.

Theobald, Q.C., and *Maclaren*, for the grandchildren. The cases *In re Hernando* (1) and *In re Bald* (4) cover the present; the real distinction is between power and property.

Vernon Smith, Q.C., in reply.

COZENS-HARDY J. (after stating facts). Though there is no express declaration in the settlement that English law is to prevail, it seems to me that from the circumstances under which it was executed, and the form of the settlement, that is a necessary consequence. The lady made a will purporting to dispose of the property subject to it in a manner that to some extent would not be permitted by the law of France if it were her own absolute property. Two points arise: first, whether the will was a good exercise of the power given by the settlement; next, whether the will was an effective disposition of the whole property. As I read the judgment of Farwell J. in *Pouey* v. *Hordern* (3), he really decided both points in favour of Mr. Theobald's contention. There Farwell J. held (though no doubt it was not necessary for the decision to go beyond the case of a special power) that a French lady could exercise a general power given by an English settlement, in a manner in which she could not dispose of her own property according to French law.

I have not merely the decision of Farwell J. in *Pouey* v. *Hordern* (3), but I have what seems to me a direct authority in an exactly similar case, *In re Bald* (5), where Byrne J. decided that a general power of appointment created by a Scottish will must be governed by Scottish law whatever may be the domicil of the donee of the power. The judgment is very short; he says: "In my opinion the Scotch law applies, even though the person exercising the power may have been a

(1) (1884) 27 Ch. D. 284.
(2) [1900] 1 Ch. 442.
(3) [1900] 1 Ch. 492.
(4) (1897) 76 L. T. 462.
(5) 76 L. T. 463.

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domiciled Englishman, and may have exercised it by an English will."

It is suggested that there is a distinction because in this case, in default of her exercising the power, the property is settled on her for her separate use. I fail to appreciate that, because the question here is whether the property passes under the execution of the power, and not whether it is disposed of as separate estate.

Solicitors: *A. F. & R. W. Tweedie; Maunder.*

D. P.

COZENS-HARDY J.

1901

Feb. 4.

In re "UNEEDA" TRADE-MARK.

Trade-mark—Invented Word—Non-descriptive Word—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *as amended by Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Uneeda" being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of s. 64, sub-s. 1 (*d*), of the Trade Marks Act. Moreover, it is descriptive of the quality or character of goods; and on both these grounds it is not the proper subject of registration as a trade-mark.

THIS was a motion by the National Biscuit Company of Jersey City, in the United States of America, that the Comptroller-General of Patents, Designs, and Trade Marks might be directed to proceed with an application by the company for registration of a trade-mark, No. 221,738, consisting of the word "Uneeda" in respect of biscuits and other things in Class 42.

Registration had been refused on the ground that the trade-mark was not an invented word within the meaning of s. 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by s. 10 of the Act of 1888, the registrar having stated his view as follows: "My view of the word 'Uneeda' is that it is a mere misspelling of the words 'You need a,' and misspelling cannot, I think, be considered invention. This makes it necessary, therefore, to deal with the word or words under

sub-section (*e*). They convey, as pointed out by Lacombe C.J., the idea that the prospective purchaser's personal comfort would be promoted by the acquisition of the article, and they are therefore words having reference to the character or quality of the goods."

The president of the company made an affidavit in support of the application, in which he stated as follows: "The word 'Uneeda' was first invented by H. N. MacKinney of Philadelphia, Pennsylvania, U.S.A., of the advertising department of the applicant company, and was originally intended to be associated with a picture of an Indian maiden, and was therefore the name of an aborigine of the North American Continent. It was also intended that a pathetic legend or story should accompany this word, but the pictorial part was afterwards abandoned and simply the word used."

In the course of the argument a judgment of Lacombe, Circuit Judge of the United States Circuit Court for the Southern District of New York, delivered on June 26, 1899, in an action of the *National Biscuit Co.* v. *Baker*, in which the learned Circuit Judge said that the device of "the manufacturer of the articles which the defendants . . . . are selling . . . . with the word 'Uneeda' before him . . . . to avoid confusion was the adoption of the word 'Iwanta' . . . . and both express the same idea, namely, that the prospective purchaser's personal comfort would be promoted by the acquisition of a biscuit."

Moulton, K.C., and *E. F. Lever*, for the applicants. One question is whether the word "Uneeda" has the same meaning as the words "You need a." The evidence shews that a misspelling of those words is not its real origin. It is an invented word within the meaning of s. 64 of the Patent, Designs, and Trade Marks Act, 1883, as amended by s. 10 of the Act of 1888, and it is a word having no reference to the character or quality of the goods in respect of which registration of it is sought. The real test is, "Are you, by using this word, preventing the public from using part of the English language which they have a right to use?" The word does not abridge

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the legitimate liberty of any one to use such language as he pleases. It is not contended that a mere misspelling of a word constitutes invention so as to make the result an "invented word," but in the present case invention is clearly shewn. There is here both misspelling and conjunction of words, resulting in a caricature of the words misspelt. There is quite as much invention in this word as there was in "Solio," which the House of Lords held to be an "invented word": *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks.* (1)

Sir R. B. Finlay, A.-G., and *R. J. Parker*, for the comptroller. The objections to registration of the mark are: (1.) That it is not an "invented word"; (2.) that it is a group of words having reference to the character or quality of the goods; (3.) that the registrar has a discretion whether certain words should be placed on the register.

One reads with surprise the affidavit filed by the applicant that the word has no connection with the words "You need a." It is said that Uneeda is the name of an Indian maiden, but we do not know her history. The "Solio" case is conclusive on the question whether this is an invented word. In the course of the argument the question was asked whether "Phit-eesi" was an invented word, and Lord Herschell said, "Probably not, because it is a mere misspelling. It suggests at once the English words." (2) In his judgment he goes further, for he says: "I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." (3)

So "Pirle," being identical in sound with "Pearl," has been held to be an improper word for registration: *Ripley & Son's Application.* (4)

(1) [1898] A. C. 571; 15 Rep. Pat. Cas. 476.

(2) 15 Rep. Pat. Cas. 480.

(3) [1898] A. C. 581.

(4) (1898) 15 Rep. Pat. Cas. 151.

"Uneeda" is also descriptive of the character or quality of the goods: *In re Grossmith's Trade-mark.* (1)

The comptroller has a discretion whether to register a trade-mark or not: *Eno* v. *Dunn* (2); *In re Australian Wine Importers* (3); *In re Turney & Sons' Trade-mark.* (4) The discretion has been rightly exercised, for the word is a mere misspelling of words having the same sound and meaning, and its registration would interfere with the rights of the large number of the King's subjects who misspell words in the English language. There must be some limit as to the words which should be allowed to be registered under s. 64, sub-s. 1 (*e*), otherwise such words as "importers of" might be registered, although not in themselves descriptive.

Moulton, K.C., in reply. The comptroller must exercise some discretion; but as regards appealing from him, he has no such discretion as a judge has. When the parties come to the Court the question "Aye or No: was it a thing which could be registered?" the official cannot, because he dislikes harsh colours, insist on letters in half-tint, and he cannot legislate or make a new class. In *Eno* v. *Dunn* (2) the words "Fruit Salt" had been held not to be good words for registration. Then another man incorporated them, and the House of Lords held that the incorporation would lead to deception, and that was the ground for holding that the comptroller had a discretion. It would be absurd to exclude all these made-up words which catch the eye of the public and do no harm to any one.

COZENS-HARDY J. This is an appeal from a refusal to register the word "Uneeda" as applied to biscuits, or the class of goods in which biscuits are contained. The appellant seeks to reverse this decision mainly, or I think I may say entirely, on the ground that this is an "invented word or words" coming within s. 64, sub-s. 1 (*d*), of the Trade Marks Act. An affidavit has been made by Mr. Crawford, who is the president of the American company which seeks the registration, in which he makes the following remarkable statement: "The word

(1) (1889) 6 Rep. Pat. Cas. 180.
(2) (1890) 15 App. Cas. 252.
(3) (1889) 41 Ch. D. 278.
(4) (1893) 11 Rep. Pat. Cas. 37.

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'Uneeda' was first invented by Mr. McKinney of Philadelphia, Pennsylvania, U.S.A., of the advertising department of the applicant company, and was originally intended to be associated with the picture of an Indian maiden, and was therefore the name of an aborigine." I entirely decline to accept that. I have no doubt whatever that the word "Uneeda" was a very clever and very ingenious idea to put in the form of one word the common expression properly comprised in three words, "You need a," and although it might be associated with the picture of an Indian maiden, it would be ridiculous to say that it was therefore the name of an aborigine. The word therefore, I take it, was and was intended to be a misspelling of the words "You need a" made into one word, the sound remaining identical. Now, is that an invented word within the meaning of the Act? As I read what was said in the House of Lords in the "*Solio*" *Case* (1), it is impossible for me to hold that it was an invented word. In the course of Mr. Moulton's argument I pointed to what Lord Herschell said with regard to the word "Phit-eesi." "Is that an invented word?" was asked, and Lord Herschell in an interlocutory observation said, "Probably not, because it is a mere misspelling. It suggests at once the English words." Mr. Moulton is quite entitled to say that that was a mere interlocutory observation, and that no judge ought to be bound by any observation which he makes in the course of an argument; but when I come to the considered judgment of Lord Herschell, when he is dealing distinctly with the question of what is the meaning of "invented word" in this sub-section, he says this (2): "An invented word is allowed to be registered as a trade-mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient

(1) [1898] A. C. 571. (2) [1898] A. C. 581.

to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form." Now, I take that to be a binding guide for me in the interpretation of this statute. If I find, as I do find here, that this is merely a putting together of three of the commonest of common English words and a misspelling of the first of them without change in the sound, I think that I am bound to hold—as Lord Herschell did—that it conveys to the ear precisely the same idea as the three words of the English language properly spelt would convey, and, that being so, it is not an invented word within the meaning of the section. That being so; the main ground upon which the appellant relies, in my judgment, disappears.

Then it was faintly argued that it might come under sub-s. 1 (*e*): "A word or words having no reference to the character or quality of the goods, and not being a geographical name." It does seem to me that these words are and are intended to be commendatory and suitable to describe something which a purchaser would find comforting and advantageous to use as being of the quality and character which would be suitable for his wants.

I therefore, on every ground, think that the decision appealed from was right, and this application must be refused with costs.

Solicitors for appellants: *Burn & Berridge.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

F. E.

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Jan. 12, 19, 26.

In re ST. HILDA'S INCORPORATED COLLEGE, CHELTENHAM.

[1900 S. 0124.]

Company—Association not for Profit—Licence—Alteration of Memorandum—Confirmation by the Court—Consent of Board of Trade—Practice—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 23—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

Where a company registered under s. 23 of the Companies Act, 1867, by licence of the Board of Trade, as a company not for purposes of gain, with limited liability but without the addition to its name of the word "limited," desires to alter its memorandum of association, the proper course is to apply in the first instance to the Board of Trade, and submit to the Board the memorandum shewing all the proposed alterations; and if the Board approve them as being consistent with the continuation of the licence the Court will then entertain the application of the company for the sanction of the Court to the alterations.

PETITION that an alteration of the memorandum of association of St. Hilda's Incorporated College, Cheltenham, might be confirmed by the Court under the Companies (Memorandum of Association) Act, 1890.

The college was incorporated on November 8, 1895, under the Companies Acts, 1862 to 1890, as an association formed as a limited company for purposes not of gain, and was authorized by licence of the Board of Trade under s. 23 of the Companies Act, 1867, to be registered with limited liability without the addition to its name of the word "limited."

The memorandum of association of the college contained, inter alia, the following provisions:—

"1. The name of the association is 'St. Hilda's Incorporated College, Cheltenham.'

"2. The registered office of the association will be situate in England.

"3. The objects for which the association is established are:—

"(*a*) To take over the buildings and property at present used for the purposes of the establishment known as St. Hilda's

College, Cheltenham, with the land and appurtenances belonging thereto, and other the assets and property now used for the purposes of the said college, subject to all existing liabilities in connection therewith, and to carry on the work of the said college on the existing premises and elsewhere as an educational establishment, hostel, and house or residence for gentlewomen and girls engaged or interested in education, whether as students or teachers, and whether pursuing their studies or avocation as teachers or simply as students.

"(*b*) To provide board, lodging, and attendance, and all other necessaries and conveniences to students attending courses of instruction at the Cheltenham Ladies' College, and to afford to such students facilities for study, research, and cultivation.

"(*c*) If thought desirable, to found scholarships, exhibitions, and prizes, and to assist needy and deserving students by loans and otherwise, or by affording them all or any of the advantages of the college either gratuitously or on reduced terms.

"(*d*) To affiliate the college, if thought desirable, with any university, college, or association."

4. The income and property of the college was to be applied solely towards the promotion of the objects of the association, and not by way of profit to the members, and this was (6.) a condition on which the Board of Trade granted a licence.

Immediately after its incorporation the association took over and had since carried on St. Hilda's College, Cheltenham, and the founders of the association had also established a similar institution at Oxford, incorporated in the same way, called St. Hilda's Hall, for providing education and a residence for gentlewomen and girls.

It was deemed to be to the advantage of both institutions that St. Hilda's Hall, Oxford, should be taken over by and become part of the undertaking of the college. A special resolution was accordingly passed and confirmed at meetings held on November 24 and December 11, 1900, as follows:—

"That the following alterations and additions be made in the memorandum of association, that is to say—

"Clause 1. To change the name of the association to St. Hilda's Incorporated College."

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"Clause 3. To add the following section at the end of section (*a*) of the said clause, namely :—

"Section (*a* 1). To take over the buildings and property at present used for the purposes of the establishment known as St. Hilda's Hall, Oxford, with the appurtenances and other the assets and property now used for the purposes of the said establishment, subject to all existing liabilities in connection therewith, and to carry on the work of the said establishment on the existing premises and elsewhere in or near Oxford, as an educational establishment, hall, hostel, and house of residence for gentlewomen and girls engaged or interested in education, whether as students or teachers, and whether pursuing their studies or avocation as teachers or simply as students.

"Section (*a* 2). To found or take over and carry on wherever from time to time may be thought desirable, similar educational establishments, halls, hostels, and houses of residence for gentlewomen and girls engaged or interested in education.

"Section (*b*). To add the words 'and at Oxford or elsewhere' immediately after the word 'college' in the said section.

"Section (*c*). To add the words 'hall or other similar establishment' immediately after the word 'college' in the said section.

"Section (*d*). To add the words 'hall or other similar establishment' immediately after the word 'college' in the first line of the said section."

The Board of Trade were not served with the petition, but had been communicated with, and had intimated that they would sanction the proposed change of name of the association subject to the filing with the Registrar of Joint Stock Companies of a printed copy of the special resolution in favour of the change; and this had been done.

The petition stated that the association had not issued any debentures, and had no debts of any kind, and asked that the alteration of the memorandum of association in accordance with the special resolution might be confirmed by the Court. There was sufficient evidence to satisfy the requirements of the Act of 1890.

The petition came on for hearing on January 12, when his Lordship considered that he ought not to make the order in the absence of the Board of Trade, and directed that the petition should stand over for a week in order that the Board might be served.

Jan. 19. *P. B. Abraham*, for the petitioner. The Board of Trade now appear, and assent to the alterations, except that they are indisposed to give us general leave to affiliate similar institutions in other parts of the country. We therefore propose to insert some such words as "with the consent of the Board of Trade" at the commencement of clauses A (2.) and D.

R. J. Parker, for the Board of Trade. The Board do not object to the alterations, but they wish to guard against giving the institution any power to absorb undertakings which can be carried on for the purpose of gain. They propose that words rendering their consent necessary to any further extension should be inserted.

BUCKLEY J. I feel a difficulty about that. In my opinion a memorandum of association should state the objects of the company specifically; and the memorandum of an association registered without the word "limited" under the licence of the Board of Trade ought not to be altered unless and until the Board is satisfied that the altered objects will leave the company one falling within s. 23 of the Companies Act, 1867. The Court will not sanction alterations in a memorandum subject to the approval of the Board of Trade. The Court never deals with hypothetical circumstances. The proper course is that the college should in the first instance make an application to the Board of Trade and submit to them the memorandum shewing all the proposed alterations. If the Board approve of those alterations, the Court will entertain the petition to sanction those particular alterations. The petition had better stand over generally, with liberty to restore when the Board of Trade have made up their minds as to the exact nature of the alterations which they are ready to consent to as being consistent with their licence.

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Jan. 26. *P. B. Abraham* stated that the Board of Trade had considered and agreed to all the alterations, with the addition of the words "with the sanction of the Board of Trade" at the beginning of clauses A (2.) and D.

R. J. Parker, for the Board of Trade.

BUCKLEY J. This is a petition presented by a company which holds a licence of the Board of Trade to carry on its business without the addition to its name of the word "limited." That licence is granted under s. 23 of the Act of 1867. The petition is under the Companies (Memorandum of Association) Act, 1890, asking the Court to confirm certain alterations in the memorandum of association. When the petition came before me, I directed the Board of Trade to be served, and I desire to say why I did that. Where the Board of Trade have granted their licence under s. 23 of the Act of 1867, they do so upon seeing the memorandum of association and satisfying themselves that the company to which the licence is granted is such as satisfies the provisions of that section. Where a petition is presented to the Court for alterations in a memorandum of association under the Act of 1890, it may be that those alterations would so alter the scope of the company's objects as that the Board of Trade, if application were made to them anew, would not license it, because it would not fall within that section. It seemed to me, therefore, that it was necessary for me, before I dealt with this application, to direct the Board of Trade to be served. The Board of Trade in this case have attended before me, and have intimated that the alterations in their opinion are not such as to necessitate any objection on their part. If the Board of Trade had not taken that view, it appears to me that the Court must have taken one or other of two courses. It must either have refused to sanction any alteration of the memorandum of association beyond that which the Board of Trade approved, or must have directed that the company should alter its name by adding to it the word "limited." Orders under the Act of 1890 can be made by virtue of s. 1, sub-s. 3, on such terms and subject to such conditions as to the Court seems fit, and unless

the Board of Trade had assented to the alterations as being in their opinion proper in the case of a company bearing their licence, I should have had to direct either that the petition should be dismissed or that the proper alterations should be made, so that the company should no longer be dispensed from the addition of the word "limited" to its name. However, the Board of Trade see no objection, and I therefore make the order.

Solicitors: *Waterhouse & Co.*, for *Winterbothams & Gurney, Cheltenham; Solicitor to the Board of Trade.*

H. C. R.

RIVINGTON *v.* GARDEN.

[1898 R. 197.]

Practice—Costs—Higher Scale—Special Grounds—Rules of Supreme Court, 1883, Order LXV., r. 9.

The fact that the title to an estate dealt with in a partition action was a complicated and difficult one, and that the action had been conducted by the solicitors in an exceptionally able and diligent manner whereby much time and expense had been saved, is not a special ground "arising out of the nature and importance, or the difficulty of the case," sufficient to enable the Court to order costs to be paid on the higher scale under Order LXV., r. 9.

Williamson v. *North Staffordshire Ry. Co.*, (1886) 32 Ch. D. 399, followed.

Davies Brothers & Co. v. *Davies*, (1887) 56 L. J. (Ch.) 481, *Re Leeuw*, (1892) 93 L. T. Jour. 333, and *Marriott* v. *Cobbett* (1894) 38 Sol. J. 620, examined, and not followed.

FURTHER CONSIDERATION.

The minutes of the order proposed for the winding up of this action, as originally framed, provided for a taxation of costs as between solicitor and client on the higher scale, and this was the only question argued.

The action was a partition action, arising under the will of one John Hillman, who died in 1830. The title to the estate, which was of considerable value (some 80,000*l.*), was complicated and difficult. The master by his certificate had found

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that ten persons were absolutely entitled to $\frac{120}{180}$ths of the testator's property, in shares varying from $\frac{5}{180}$th to $\frac{20}{180}$th, and that the remaining $\frac{60}{180}$th of the property was settled; of the persons who were certified as being absolutely entitled some were in fact trustees. It was stated in court, and upon this the whole argument was founded, that if the matter were referred to the master he would certify that the title to the estate was a very complicated one, and that the action had been conducted by the solicitors engaged in an exceptionally able and diligent manner, whereby much time and expense had been saved.

H. Terrell, K.C., and *Popham*, for the plaintiffs. Where skill, ability, and promptitude had been displayed by solicitors in winding up an estate, costs on the higher scale were allowed by Chitty J. in *Re Leeuw* (1), and again in a partition action, where the proceedings had been ably conducted and expense saved, *Marriott* v. *Cobbett* (2); and also by Kekewich J. in *Davies Brothers & Co.* v. *Davies* (3), where the case had been particularly well prepared for trial. This was a difficult action which required exceptional ability: the necessity for the use of this ability arose "out of" the importance or the difficulty of the case within the very words of Order LXV., r. 9, and this ability ought to be remunerated on the higher scale. The higher scale is an extra remuneration to the solicitor only, and, with deference to the remarks in *Assets Development Co.* v. *Close Brothers & Co.* (4), has nothing to do with payments to expert witnesses. No doubt the length or difficulty or importance of the case alone is not now enough: *Williamson* v. *North Staffordshire Ry. Co.* (5); *Paine* v. *Chisholm* (6); but when you have exceptional skill and ability shewn in consequence of, or arising out of, the difficulty and importance of the case, then the rule applies. In *Paine* v. *Chisholm* (6) no exceptional skill appears to have been necessary.

[*Ellington* v. *Clark, Burnett & Co.* (7) was mentioned.]

(1) 93 L. T. Jour. 333.
(2) 38 Sol. J. 620.
(3) 56 L. J. (Ch.) 481.
(4) [1900] 2 Ch. 717, 721.
(5) 32 Ch. D. 399.
(6) [1891] 1 Q. B. 531.
(7) (1888) 5 Rep. Pat. Cas. 319.

Dibdin, K.C., for one of the parties absolutely entitled. An order for costs on the higher scale is simply an authority to the solicitor to charge higher fees in certain items against his lay client. It has nothing to do with fees to counsel or costs of witnesses, expert or otherwise. This appears from Appendix N to the rules, where examples of costs on the higher and lower scale are set out in parallel columns. In *Williamson* v. *North Staffordshire Ry. Co.* (1), the difficulty was one for counsel; the case took a long time in court. In a complicated partition action like this, there may be no special difficulty for counsel in court, but a great deal of difficulty for the solicitors in chambers, and the ability there displayed is a special ground arising out of the difficulty of the case for which the rule intended that the solicitor should be remunerated.

Whinney and *Crossfield*, as representing some of the settled shares, did not oppose, but stated that they were not in a position to consent.

Christopher James, *Manning*, and *H. W. Vaughan Williams*, for other defendants, did not oppose.

BUCKLEY J. In this further consideration there is only one question upon which I have to pronounce a decision, and that is, whether I ought to allow the costs of the action as between solicitor and client, and on the higher scale. Of the parties before me, no one opposes the application for costs on those terms; but some of the defendants are trustees and say that they cannot consent, and therefore, as I am not in a position to make an order by consent, I must consider what my powers are under Order LXV., r. 9, and must make the order which I consider to be the right one.

Now the action is a partition action, and resulted in a certificate which finds ten shares coming to persons absolutely entitled, and one share, amounting, I think, to $\frac{60}{180}$ths as settled. But of the persons who are found absolutely entitled some I am told are in fact trustees. There are also others who are not in a position to consent.

Mr. Terrell asks me to assume that if I were to refer to the

(1) 32 Ch. D. 399.

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master and ask him for his opinion upon the matter he would certify that the matter has been one of considerable complication, and that it has been carried through in an extremely able way in chambers, and that all needless detail has been avoided. I do not know how that is; but, for the purposes of this judgment, I will make the assumption that that is so. Under those circumstances ought I to allow, under Order LXV., r. 9, costs on the higher scale? I am not impressed with the great difficulty and importance of this case. I have seen partition actions that were very much more difficult to work out than this. But again I will assume that this is a case of difficulty and of importance, and that the amount in question is large.

An argument has been addressed to me which seems shortly stated to be this: that whereas the rule says I may allow costs on the higher scale on special grounds arising out of the nature and importance or the difficulty or urgency of the case, I am thereby authorized to allow costs on the higher scale on account of the ability and diligence with which the solicitors have conducted an important case. Now my first observation is, that the rule does not say so. What is the exact meaning of the rule is, I agree, a matter of great difficulty; but I am guided by two decisions in the Court of Appeal, and upon those I must use the best of my judgment in determining what is right under the present circumstances. I have had to deal with them before in the case of *Assets Development Co.* v. *Close Brothers & Co.* (1), but I will deal with them again upon this occasion. In *Williamson* v. *North Staffordshire Ry. Co.* (2) there was before the Court of Appeal a case involving difficult questions of fact and of law, and Cotton L.J. said that the case was one of importance and of extreme difficulty, but the Court of Appeal did not see their way to allow costs on the higher scale by reason of that fact. There is an interlocutory observation by Fry L.J., where he says (3): "The rule does not say 'on the ground of the importance and difficulty' of the case, but on 'special grounds arising out of the nature and importance,'" and so on. On the top of p. 402 he assents

(1) [1900] 2 Ch. 717, 721.
(2) 32 Ch. D. 399.
(3) 32 Ch. D. 401.

to the proposition that the case is one of great importance and difficulty, but says, "Is that a special ground?" Of course meaning that it was not a special ground: and the Court of Appeal so held. Now looking at that judgment it appears impossible for me to say that from the fact that this case was one of difficulty and importance I derive authority to reward solicitors for the ability with which it is said they conducted it. Directly you have a case of importance and difficulty, the solicitor if he does his duty will of course be put on his mettle, and will use exceptional care and diligence in attending to it. But I must find a special ground "arising out of" the nature and importance or the difficulty of the case. I quite agree that the use of extraordinary ability and diligence may be a special ground, but it is a special ground arising, not out of the importance of the case, but from the fact that the solicitor was a man of ability, and that he used his best ability in the case. There are no words in the rule which apply to that.

Williamson v. *North Staffordshire Ry. Co.* (1), which was in 1886, was followed in 1891 by a case of *Paine* v. *Chisholm.* (2) In that case Stephen J. had given costs on the higher scale. The Court of Appeal discharged his order, and discharged it on the ground that he had no power to give them, because the rule was not satisfied. I need not say that but for this rule the Court has no power to give costs on the higher scale. Bowen L.J. at the conclusion of his judgment says (3): "I should wish to add that we have not dealt lightly with this question. We took time to consider our judgment in order that we might go through all the cases that could have any bearing on the point." The effect of the judgment in *Paine* v. *Chisholm* (2) was this—that in order to make the rule applicable you must satisfy two conditions: first, that the case is one of importance or difficulty or urgency, whichever cause you are going to rely upon; and, secondly, that the special ground alleged is one arising out of that fact. Lord Esher says so at p. 534, Bowen L.J. says so at p. 536, and Fry L.J. at p. 537 says this: "It is to be observed, therefore, that there

(1) 32 Ch. D. 399. (2) [1891] 1 Q. B. 531.
(3) [1891] 1 Q. B. 537.

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must be 'special grounds.' What the precise meaning of that expression may be it is difficult to define; but it is, at any rate, clear that it cannot apply unless there is something peculiar and special in the circumstances of the case. Again, the special grounds must arise from the nature and importance, or from the difficulty, or from the urgency of the case." Those are the two cases in the Court of Appeal. There are other cases in the Appeal Court, such as *Ellington* v. *Clark, Burnett & Co.* (1), where costs on the higher scale were allowed in a patent action on the ground that "when the plaintiffs brought scientific witnesses it was necessary for the defendants to bring scientific witnesses."

Upon the assumption which I have made, it appears to me that the special ground alleged here is not that the case was a difficult one or an important one (and having regard to the decision of *Williamson* v. *North Staffordshire Ry. Co.* (2) the application could not have been sustained upon that), but the special ground alleged is, that the solicitors having to deal with a complicated and important case used exceptional ability, and conducted the proceedings in an extremely able way, and escaped all unnecessary details, and thus saved costs. In other words, the special ground alleged is the conduct of the solicitor, and the ability of the solicitor, and not the nature of the case.

But then I have been referred to authorities which are said to be the contrary of that, and I will mention them in their order of date. In the first place, there is the case of *Davies Brothers & Co.* v. *Davies* (3) before Kekewich J. in 1887. My first observation is, that in that case, *Williamson* v. *North Staffordshire Ry. Co.* (2), which was decided in 1886, was not cited. If the learned judge had had that case before him he would, I think, have treated it as governing the case with which he had to deal. Kekewich J. there said: "I am now dealing with a case which is certainly a special one as regards its nature and importance. It necessarily occupied a considerable time, many witnesses were called, and the oral evidence was of a special character.

(1) 5 Rep. Pat. Cas. 319, 328. (2) 32 Ch. D. 399.
(3) 56 L. J. (Ch.) 481, 486.

It involves large questions of the highest importance to the parties concerned, and is important also to others. It was presented to the Court in such a manner that I have been able to discuss the real questions in issue without wasting time on oral or documentary evidence touching matters not really in dispute, or for some other reason not immediately relevant. Without wishing or intending the slightest injustice to counsel, who have rendered me invaluable assistance, I think that this is in great measure due to the way in which the case was prepared for trial on both sides, the labour and responsibility falling mainly on the plaintiffs, and it seems to me to be essentially a case to which Order LXV., r. 9, applies. I therefore propose to direct that the costs subsequent to reply shall be taxed on the higher scale." This dwells upon the facts that the case was a heavy one, and that a large amount of oral evidence had been given. But the Court of Appeal in *Williamson* v. *North Staffordshire Ry. Co.* (1) had said that that was not a special ground within the rule. The next is a case before Chitty J. in 1892 of *Re Leeuw.* (2) In this case again *Williamson* v. *North Staffordshire Ry. Co.* (1) was not cited. It was not an opposed case. It was an administration action, and counsel for the plaintiff asked for costs on a higher scale. Mr. Byrne Q.C. and Mr. Hatfield Green supported the plaintiff in bearing testimony to the efficient manner in which the solicitors had done their duties. Mr. Pochin is simply stated to have appeared for the residuary legatee. There seems to have been no argument and no opposition, and Chitty J. said this according to this note : " Where skill, ability, and promptitude in winding up an estate were specially displayed, the solicitors were entitled to special acknowledgment. In this case there was no doubt the solicitors for the plaintiff had saved a great deal to the estate in the way of costs, and they had demonstrated the rapidity with which the machinery of the Court could be used for winding up estates where solicitors understood the method by which the machinery could be put in motion. He thought the solicitors should be rewarded for having carried through the administration so rapidly and successfully, and he

(1) 32 Ch. D. 399. (2) 93 L. T. Jour. 333.

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should order their costs to be taxed on the higher scale." The other is a case of *Marriott* v. *Cobbett* (1), which is found in the *Solicitors' Journal* newspaper of July 14, 1894, at p. 620. It was a partition action. *Williamson* v. *North Staffordshire Ry. Co.* (2) again was not cited; and at the end of the report are these words in brackets: "We are favoured with a report of the above case." I infer that it was not a report by one of the gentlemen who usually report for the *Solicitors' Journal*, but that a note had been obtained from somebody or another. It is therefore of but little authority. The learned judge there is reported to have said: "That he had received from his chief clerk a special report as to the extremely able way in which the proceedings in chambers had been conducted, and to the effect that all needless detail had been avoided, and his Lordship said that, although he very rarely allowed the higher scale, he should do so in this case as an encouragement to others." I regard those two notes, for they are nothing more than notes of decisions, with doubt, as they are not reports duly made in the ordinary course by the gentlemen who are in the habit of reporting the decisions of the Court. It may very well be that there were some circumstances before the learned judge which do not appear on these notes, which might have brought the case within the rule, and in *Re Leeuw* (3) it seems to me that there were circumstances which the learned judge might have relied upon which would have brought the case within the rule, although the report does not state that he did rely upon them.

I can only say, so far as I am concerned, I am unable to find in the rule anything which says that costs on the higher scale may be allowed on the special ground that solicitors ought to be encouraged or ought to be rewarded, which is the language attributed to the learned judge in those notes—as to which I may express my doubts as to whether his Lordship used it in that connection. But those two cases, as it appears to me, are inconsistent with the decision in *Williamson* v. *North Staffordshire Ry. Co.* (2) and the decision in *Paine* v. *Chisholm* (4), and if the cases had been adversely argued and the

(1) 38 Sol. J. 620.
(2) 32 Ch. D. 399.
(3) 93 L. T. Jour. 333.
(4) [1891] 1 Q. B. 531.

former decision had been called to the attention of the learned judge, I do not think that he would have decided them in that way. It is sufficient for me to say that I decline to follow them, because, as it appears to me, they are contrary to the principle which is laid down by the Court of Appeal.

The result of it, therefore, is this—that as in *Assets Development Co.* v. *Close Brothers & Co.* (1), the case which I had before me earlier, I can only say, following the decisions in the Court of Appeal, that unless I can find a special ground "arising out of" some one of the matters mentioned in Order LXV., r. 9, I have no jurisdiction to order costs on the higher scale.

I am of opinion that the conduct of the solicitors in the matter—the way in which they have done their duty—is neither "the nature of the case," nor "the importance of the case," nor "the difficulty of the case," nor "the urgency of the case." It is the manner in which they have dealt with those things, which to my mind is a totally different thing. Under those circumstances, therefore, I must refuse to order costs on the higher scale.

Solicitors: *Gresham, Davies & Dallas; Clayton, Sons & Fargus; Hewitt & Urquhart; Thorold, Brodie & Co.*

(1) [1900] 2 Ch. 717.

W. C. D.

BUCKLEY J.
1901
Feb. 13.

In re WHITE.
WHITE *v.* EDMOND.

[1900 W. 4755.]

Evidence—Presumption—Child-bearing—Impossibility of Issue—Woman past Child-bearing—Widow who has had a Child.

A widow, aged fifty-six years and three months, who had never had but one child (born when she was between twenty-one and twenty-two years of age), and lived afterwards with her husband for twenty-four years until his death, presumed to be past child-bearing.

The principle of the cases in which spinsters have been presumed to be past child-bearing applies also to widows who have had children.

WILLIAM WHITE by his will bequeathed certain leasehold houses to trustees upon trust for his daughter Anna for life, and upon her decease he directed the trustees to stand possessed thereof in trust for all the children of his said daughter Anna who should live to attain the age of twenty-one years, and if more than one in equal shares as tenants in common.

The testator's daughter Anna was born on November 15, 1844. She was married to John Howard White on March 10, 1866, and lived with him till his death on August 15, 1890. They had one child only, namely, a son, John William George White, who was born on June 1, 1866. Mrs. White had not married again; and she and her son, now aged thirty-four, called upon the surviving trustee of the will to transfer the trust premises to them. They took out a summons asking for a declaration that upon the true construction of the will, and in the events which had happened, they were between them absolutely entitled to the leaseholds by the will specifically bequeathed in trust for Anna White and her children, and that the defendant as trustee of the will might be ordered or authorized to assign the same to them.

H. Terrell, K.C., and *James Bacon*, for the plaintiffs. The Court will presume that a widow of the age of fifty-six years and three months, who lived with her husband for twenty-four

years and who has not had a child for thirty-four years, is past child-bearing: *Haynes* v. *Haynes* (1), where the previous authorities are collected in a note; *In re Widdow's Trusts* (2); *In re Millner's Estate* (3); *Maden* v. *Taylor* (4); *Davidson* v. *Kimpton* (5); *Browne* v. *Warnock* (6); Dart on Vendors and Purchasers, 6th ed. p. 391. On the other hand, in *Croxton* v. *May* (7) the Court refused to treat a widow as past child-bearing whose age was fifty-four years and six months, and who had never had any children; but in that case the married life had been practically only about three years. And in *In re Hocking* (8) the Court also refused to make the presumption. That decision was based on the principle that the Court will not deprive a living person of a possible interest. It was therefore held that it could not be presumed in favour of the next of kin that a widow, aged fifty-four, who had never had a child, was past child-bearing, so as to deprive other living persons of the benefit of a maintenance clause.

Hornell, for the trustees.

BUCKLEY J. The question which I have to determine is whether a lady born on November 15, 1844, who is therefore now fifty-six years and three months old, is to be taken to be past the age of child-bearing. [His Lordship stated the facts, and continued:—]

A number of cases have been cited, but the material ones to my mind are these: *Haynes* v. *Haynes* (1), where it was held that a spinster aged fifty-three years and two months must be presumed to be past the age of child-bearing, and the head-note adds a query whether this limit of age is not too low. *In re Widdow's Trusts* (2), where Malins V.-C. made the presumption in the case of a widow of the age of fifty-five years and four months who had never had any children, and in the case of a spinster of the age of fifty-three years and nine months. *In re Millner's Estate* (3), where the age of the lady was forty-

(1) (1866) 35 L. J. (Ch.) 303.
(2) (1871) L. R. 11 Eq. 408.
(3) (1872) L. R. 14 Eq. 245.
(4) (1876) 45 L. J. (Ch.) 569.
(5) (1881) 18 Ch. D. 213.
(6) (1880) 7 L. R. Ir. 3.
(7) (1878) 9 Ch. D. 388.
(8) [1898] 2 Ch. 567.

BUCKLEY J. 1901 WHITE, *In re.* WHITE *v.* EDMOND.

nine years and nine months. She was married and had never had a child. The marriage had taken place in 1846, and the decision was pronounced in 1872, so that there had been twenty-six years of married life, no issue, and the husband was still living. *Davidson* v. *Kimpton* (1), where the lady was a spinster of the age of fifty-four, and *Lyddon* v. *Ellison* (2), where she was a spinster and aged fifty-six. It will be observed that in all the cases to which I have referred the ages were less than that of the lady in the present case; but it will also be remarked that I have not mentioned any case of a widow who had had a child. One case was that of a widow, but she had had no children: *In re Widdow's Trusts* (3); and there was one case in which the marriage was still subsisting: *In re Millner's Estate.* (4) In these circumstances I have to consider whether the cases relating to spinsters do not equally apply to widows who have had children. The only difference that occurs to me is that there is nothing to shew in the case of spinsters whether they are or have been capable of child-bearing while in the case of a widow who has had a child there is. On the other hand, if there has been a long lapse of time since the birth of a child—as in this case twenty-four years—the presumption will be that the capacity of child-bearing has ceased. It appears to me, therefore, that I can apply the principle of the cases relating to spinsters also to widows who have had children. It is said that there are two cases to the contrary. *Croxton* v. *May* (5) is the first of these; it seems to me to be distinguishable. There the age was fifty-four years and six months, the lady had had no children, but the married life had practically been only about three years, for although she had been actually married for seventeen years, husband and wife had been separated for the first fourteen years. There the absence of capacity to bear children had not been sufficiently proved. The other case is *In re Hocking.* (6) The principle there laid down is that the Court will not make the presumption for the purpose of depriving a living person of a

(1) 18 Ch. D. 213.
(2) (1854) 19 Beav. 565.
(3) L. R. 11 Eq. 408.
(4) L. R. 14 Eq. 245.
(5) 9 Ch. D. 388.
(6) [1898] 2 Ch. 567.

possible interest. Lindley M.R. says (1): "If property is given to A. in the event of B. having no children, can A. claim that property before the death of B.? My answer is, No, neither at law nor in equity, unless B.'s possible child is the only person who can deprive A. of the property. When that is the case, the Court of Chancery has ordered funds under its control to be paid to A. when satisfied that B. owing to her age, can have no child." The case before me is exactly within that exception. The son, John William George White, has attained twenty-one, and his interest is vested. If Mrs. White has more children who attain twenty-one the property, instead of passing wholly to him, will be partially divested and will pass to him and the other children, but Mrs. White's possible child who attains twenty-one is the only person who can deprive him of any part of the property. In giving the whole to him the Court is not depriving any living person of a possible interest. In my opinion *In re Hocking* (2) does not apply to this case, and I hold that the plaintiffs are entitled to have the funds paid to them.

Solicitors: *Keddey Fletcher & Fry; Philbrick & Co., for Haynes & Co., Bow.*

(1) [1898] 2 Ch. 571. (2) [1898] 2 Ch. 567.

H. C. R.

JOYCE J.

1901

Jan. 25.

MIDDLEMAS *v.* STEVENS.

[1901 M. 35.]

Settled Estate—Tenant for Life—Person having Powers of—Power of Leasing—Bonâ fide Exercise—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

The defendant was entitled under the will of her deceased husband to the use and enjoyment rent free of a certain house for so long during her widowhood as she should personally reside in the same. Being minded to marry again, she proposed to exercise her leasing powers as tenant for life under the Settled Land Acts by granting a lease of the house to her intended husband for twenty-one years. The plaintiffs, who were entitled in remainder on the cesser of her interest, objected to the lease and brought an action to restrain her from granting it. On motion for an injunction:—

Held, that, having regard to the defendant's object in granting the lease, it was not a bonâ fide exercise of the powers of a tenant for life under the Settled Land Acts, and the plaintiffs were entitled to succeed.

MOTION.

R. P. Stevens by his will and a codicil thereto, dated respectively September 29 and October 12, 1897, gave to his wife (the defendant) the use and enjoyment rent free of his residence known as the Hall, at Sandiacre, in the county of Derby, wherein she then resided, for so long during her widowhood of him as she should personally reside in and occupy the same, and also the like use and enjoyment for so long as she should so as aforesaid personally occupy the said residence of all the furniture and household effects, and all other effects and things in, upon, and about the same, and in, upon, and about the buildings, gardens, grounds, and premises occupied therewith; and after giving the defendant an annuity of 500*l.* during her life, and a certain other annuity and certain legacies to other persons, the testator gave the whole of the residue of his real and personal estate, including the said residence on the determination of the interest so granted as aforesaid to the defendant, to his trustees upon trust for sale, and to hold the proceeds of such sale in trust for the plaintiffs absolutely.

The testator died on May 1, 1899, leaving his widow, the defendant, him surviving.

In November, 1900, the defendant approached the trustees of the will, and after intimating to them that she was about to marry again, requested them to grant her a lease of the Hall and to sell the furniture to her at a valuation. This the trustees declined to do. The defendant then suggested that she had power, as a tenant for life under the Settled Land Acts, to grant a lease of the premises, and she informed the trustees of her intention to get married, in which event she would, prior to her marriage, exercise her power of leasing by granting a lease of the premises to her intended husband for the term of twenty-one years. The plaintiffs objected to this, and it appeared from their evidence that, in the event of the defendant's interest in the premises ceasing, they would elect to take the property in specie with the view of occupying it themselves. Under these circumstances, after some correspondence had passed between the defendant and the trustees, the plaintiffs commenced this action, and now moved for an injunction to restrain the defendant until the trial from granting or purporting to grant a lease of the Hall to her intended husband, or any lease of the premises, without in the first place giving the plaintiffs an option of accepting a lease thereof on the same terms.

Hughes, K.C., and *A. St. J. Clerke*, for the plaintiffs. No doubt upon the authorities the defendant is in the position of a person having the powers of a tenant for life under the Settled Land Acts; but in granting the proposed lease she is not having regard to the interests of all parties entitled under the settlement. The plaintiffs object. They desire, when the defendant's interest ceases, to occupy the house themselves, and their wishes and sentimental feelings are to be regarded. A tenant for life has no power under the Settled Land Acts to grant a lease under such circumstances as here exist: Settled Land Act, 1882, s. 53. On her re-marriage the defendant's interest at once ceases; her interest as tenant for life, therefore, is infinitesimal. The case is governed by the principles laid

JOYCE J. 1901 MIDDLEMAS v. STEVENS.

down in *Dowager Duchess of Sutherland* v. *Duke of Sutherland*. (1) This lease will not be granted by the defendant in the bonâ fide exercise of her leasing powers for the benefit of the settled estate, but for the purpose of conferring a benefit upon herself at the expense of those who are to come after her in the enjoyment of the estate. The question of motive, or the purpose of granting the lease, is material in considering whether it is granted in good faith and for the benefit of the estate.

In *Chandler* v. *Bradley* (2) a lease granted by a tenant for life under the Settled Land Acts was held void on the ground that a bribe had been accepted by the lessor from the lessee. The bribe need not be of a pecuniary nature. Here the defendant secures a benefit for herself. Again, the rent reserved must be the best that can reasonably be obtained: Settled Land Act, 1882, s. 7, sub-s. 2.

In *Montgomery* v. *Charteris* (3) Lord Eldon says: "There is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others, as he has for himself; if he has got more for himself than for others, that is decisive evidence against him." Applying that test here, the lease cannot be upheld.

George Lawrence, for the defendant. Assuming that the proposed lease complies with the terms of the Settled Land Acts, it is not invalidated by reason of the lessee bearing a particular relationship to the tenant for life, or because the tenant for life may indirectly benefit by it. The defendant in this case will get no pecuniary benefit. In *Dowager Duchess of Sutherland* v. *Duke of Sutherland* (1) it was clear that the remaindermen would be prejudiced; here it is not so, the lease being for the benefit of the estate.

Under the old law a tenant for life had power to grant a lease to a trustee for himself: *Bevan* v. *Habgood*. (4) The proposed lease is not necessarily bad.

(1) [1893] 3 Ch. 169.
(2) [1897] 1 Ch. 315.
(3) (1817) 5 Dow, 293, 344.
(4) (1860) 1 J. & H. 222.

JOYCE J. I have no doubt in this case. A tenant for life in exercising any of the powers conferred by the Settled Land Acts must have regard to the interests of all parties entitled under the settlement. Here is a lady who is tenant for life during widowhood. Apart from any question as to her relationship to the gentleman who is the intended lessee, if I found a person, whose interest in the settled property would come to an end to-morrow, persisting in granting a lease which was objected to by all those entitled in remainder, I should regard the case with considerable suspicion. But this case goes beyond suspicion. It is clear from the correspondence that the real object of the lady in granting the lease is that she may herself continue in occupation of the premises. That, in my opinion, is not a bonâ fide exercise of her powers as tenant for life. But it does not rest there, because it is admitted by the correspondence that she has no intention of granting the lease in the event of her not marrying the gentleman in question. I think the plaintiffs are entitled to an injunction restraining the defendant from granting the lease without their consent or the sanction of the Court.

Solicitors: *F. Kinch, for Eking & Wyles, Nottingham; Hind & Robinson.*

G. A. S.

JOYCE J.
1901
Jan. 22, 26.

WILSON *v.* TAVENER.

[1900 W. 5393.]

Agreement—Construction—Advertising Station—Tenancy from Year to Year —Licence—Revocation—Notice.

By an agreement in writing the defendant agreed to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter-day:—

Held, that this was not a tenancy from year to year, but a licence revocable at will on reasonable notice, and that a quarter's notice terminating at the end of a year of the currency of the agreement was a reasonable notice.

THIS was an action for an injunction to restrain the defendant from removing a hoarding and wall which had been used by the plaintiff as bill-posting stations under an agreement in writing dated January 9, 1895, and for damages.

The agreement was contained in two documents of the above date, each signed by both the plaintiff and the defendant.

The first document was addressed by the defendant to the plaintiff, and (so far as material) was as follows: "I hereby agree to let you erect hoarding for a Bill Posting and Advertising Station upon the ground being the forecourt of the Cottage No. 158 Falcon Road Battersea. The said hoarding . . . . to be erected and kept in repair at your own expense. Together with the end or gable wall of the cottage No. 148 Falcon Road for the same purpose at the rent of Ten pounds per annum payable quarterly on the four usual quarter-days. The first quarter to be due the 25th day of March 1895." The document also contained a stipulation that the hoarding was to be the plaintiff's property.

The second document was addressed by the plaintiff to the defendant, and by it the plaintiff agreed to take and erect at his own expense the hoarding for a bill-posting and advertising station, together with the gable end of the said cottage for the same purpose, and to pay the rent. It did not materially differ in its terms from the former document.

On September 29, 1900, the defendant by her solicitors gave notice in writing to the plaintiff to quit and deliver up the forecourt and all other the premises held by him under the agreement of January 9, 1895, as a bill-posting and advertising station, and requiring him to remove all boards or hoardings and all other fixtures fixed by him in, to, or about the premises, on or before December 25, 1900.

On December 22, 1900, the plaintiff issued the writ in this action, but it was not served upon the defendant till the afternoon of December 27.

In the meantime, namely, on the morning of the 27th, the defendant, who was rebuilding the cottages, caused the wall and the hoarding to be removed by her builders.

On January 11, 1901, the plaintiff moved for an interlocutory injunction, but no order was made on the motion except that the action should be set down for trial without pleadings, the trial to come on on January 22.

At the trial the claim for an injunction was abandoned.

Moyses, for the plaintiff. The sole question is whether this agreement created a tenancy from year to year or was a mere licence. I submit that this is a tenancy from year to year, and that the plaintiff was entitled to a six months' notice ending on Christmas Day: Woodfall's Landlord and Tenant, 16th ed. p. 231.

Badcock, Q.C., and *Ribton*, for the defendant. This is not a demise either of land or of an easement; it is a mere licence to erect a hoarding and post bills on a gable wall, and is revocable at will on reasonable notice: *Wood* v. *Leadbitter* (1); *Aldin* v. *Latimer Clark, Muirhead & Co.* (2) There are no words of demise, and neither the commencement nor the duration of the term is fixed; and there is no exclusive occupation by the plaintiff: Woodfall's Landlord and Tenant, 16th ed. p. 134; *Smith* v. *Lambeth Assessment Committee* (3); *Reg.* v. *St. Pancras Assessment Committee* (4); *Kerrison* v. *Smith*. (5)

(1) (1845) 13 M. & W. 838.
(2) [1894] 2 Ch. 437, 448.
(3) (1882) 10 Q. B. D. 327.
(4) (1877) 2 Q. B. D. 581, 590.
(5) [1897] 2 Q. B. 445, 451.

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The notice given to a tenant from year to year has never been extended to the case of an agreement for the use of property as an advertising station, and in the absence of any evidence as to custom we submit that a three months' notice is a reasonable and sufficient notice.

Moyses, in reply. In *Smith* v. *Lambeth Assessment Committee* (1) there was no pretence for claiming exclusive possession; in *Reg.* v. *St. Pancras Assessment Committee* (2) the hoardings were of a very temporary character; *Kerrison* v. *Smith* (3) was a case of an oral licence. This agreement contains all the requirements of a tenancy within the definition in Woodfall.

Cur. adv. vult.

Jan. 26. JOYCE J. This case has reference to a hoarding which the plaintiff was allowed to erect on the forecourt of a house in Falcon Road, Battersea, and also to the use of the gable end of another house in the same road for the purpose of posting bills thereon, and he was allowed to do that under an arrangement with the defendant. The action was for an injunction and damages in respect of the interference with the hoarding and the use of the gable end after Christmas, 1900. It was clear before me that, having regard to what had taken place, there was no case for an injunction. The only question was whether the plaintiff was entitled to damages for the interference with his alleged rights. There were no facts in dispute, but there was a question of law to be determined, namely, whether a three months' notice which had been given by the defendant to the plaintiff to determine the use of the forecourt and the gable end was a sufficient and proper notice, or whether the plaintiff was entitled to a six months' notice on the ground that he was a tenant or quasi tenant of the defendant. If a six months' notice was required, then the defendant was wrong, and the plaintiff is entitled to substantial damages; but if the three months' notice was sufficient, then the defendant was right and the action fails.

(1) 10 Q. B. D. 327. (2) 2 Q. B. D. 581.
(3) [1897] 2 Q. B. 445.

The arrangement was contained in two documents of even date. One of them was obviously drawn to be signed by the defendant and the other by the plaintiff. In point of fact they both signed each, and though there are some minor discrepancies there is no material difference between them. I have read them through carefully and have considered them, and I have looked at the cases which have been cited, and I have arrived at the conclusion that these documents did not confer on the plaintiff any right to the exclusive possession of any property or building of the defendant, and therefore I think that there was no demise or lease, and that the relation of landlord and tenant was never created between them. The effect of the documents in my opinion was to give the plaintiff a licence which was always revocable at any time subject to the terms of the express contract, and we must go to the contract to see how the relation between the parties could be determined. No one argued before me that the arrangement was perpetual. It must have been capable of being put an end to by either party, though, having regard to the times of payment, I think it would be difficult to make out that the arrangement could be determined in the middle of a quarter, or possibly even in the middle of a year. But here it was sought to be determined at the end of the year and a quarter's notice was given. I can find no law or Act of Parliament which requires in such a case six months' notice to be given. In my opinion the notice which was given was a sufficient and reasonable notice, and therefore I think that this action fails and must be dismissed with costs.

Solicitors: *G. Aplin Nichols; Woodbridge & Sons.*

H. B. H.

WRIGHT J. 1901 Jan. 17.

In re LADY FORREST (MURCHISON) GOLD MINE, LIMITED.

[00135 of 1900.]

Company—Promoter—Secret Profit—Duty as to Extent of Disclosure.

A syndicate, of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus shewing that the directors were aware that similar properties were often resold "to the public" at a profit, and were "not unmindful of the benefit that" might "arise by converting the syndicate into a very much larger company within a short period."

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase-money much larger than what had been paid for and expended upon the mine by the syndicate. The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors, that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and, subject as aforesaid, there was nothing in the prospectus to shew that the sale was at a profit.

The Court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding-up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company:—

Held, (1.) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2.) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

(3.) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4.) That although the company might have had a right to rescind the contract, S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein v. *Barnes*, [1900] A. C. 240, distinguished.

Semble, that *Gover's Case*, (1875) 1 Ch. D. 182; *In re Cape Breton Co.*, (1885) 29 Ch. D. 795; and *Ladywell Mining Co.* v. *Brookes*, (1887) 35 Ch. D. 400, are still binding authorities.

THE Murchison (Western Australia) Gold Syndicate, Limited, was incorporated on February 11, 1895, with a capital of 25,000*l.* in shares of 1*l.* each, its principal objects being to acquire and work mines in Australia or elsewhere, and to carry into effect an agreement between J. Blackwell, as agent for the syndicate, and E. W. D. Longden, for the purchase of a mine in the Murchison Goldfields, Western Australia.

A prospectus was issued by the syndicate dated February 7, 1895, offering 12,500 of the shares for subscription.

In this prospectus it was stated, after referring to two other companies the properties of which were being "sold to the public," that "this shews the immense profit that can be derived from the acquisition of such properties at an early stage, and, after a comparatively small development, reselling them to the public." The prospectus also stated that the directors were not "unmindful of the benefit that may arise, not only by converting the syndicate into a very much larger company within a short period, as others have done, but by obtaining other properties on equally favourable terms, with the view, after their engineer has tested them with the syndicate's plant, to dispose of them on a similar basis to that which is now being accomplished with" two other companies named, "which have just been formed for dealing with two properties in the Murchison district."

By an agreement dated October 14, 1895, between the syndicate of the one part and J. Blackwell, as trustee for and on behalf of a company about to be formed under the name of the Lady Forrest (Murchison) Gold Mine, Limited, it was agreed that the syndicate should sell and the company should purchase the mining property of the former for, first, 75,000*l.*, payable as to 50,000*l.* by the allotment of 50,000 fully paid-up shares of 1*l.* each in the company to the syndicate or its nominees, and as to the balance of 25,000*l.* at the option of the syndicate in cash or shares, or partly in each, and, in further consideration of the large sums of money expended by

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the syndicate upon the properties sold, the company agreed to repay the syndicate not exceeding 5000*l.* in respect of the sum so expended—the 5000*l.* being payable only out of premiums to be obtained by issuing certain of the company's shares at a premium.

The Lady Forrest (Murchison) Gold Mine, Limited, was incorporated on October 16, 1895, with a capital of 100,000*l.* in shares of 1*l.* each, its principal objects being to acquire and work mines in Australia or elsewhere, and to adopt and carry into effect the last-mentioned agreement. The company issued a prospectus, dated October 17, 1895, offering 40,000 of its shares for public subscription. The prospectus stated the names and addresses of the company's six directors, including G. Darlington Simpson, and with reference to them said, "The above gentlemen being the directors of the original syndicate." The prospectus also contained the following statements:—

"This company is formed to acquire, work, and further develop a valuable gold-mining property in the centre of the Murchison Goldfields, Western Australia, registered . . . . as the 'Lady Forrest Mine.' . . . This important property was acquired by the Murchison (Western Australia) Gold Syndicate, Limited, in the month of February last. The directors of the syndicate at that time had under consideration the erection of a 10-stamp mill."

Reference was then made to inspection of the mine and a report on it by an engineer and mining expert, who, said the prospectus, "advised the syndicate to employ its capital in further opening the mine for a large output of ore." This, it continued, had been done by sinking shafts and making drives and cross-cuts, "and thus the mine is in a highly developed state, with winding machinery to supply at once a 20-head battery. He has made a contract, pending the erection of the syndicate's mill, with the local public mill for the crushing of 8000 tons of ore, and the results of these crushings will become the property of the Lady Forrest (Murchison) Gold Mine Company. Hence the directors of the syndicate resolved, in accordance with the original pro-

gramme put forward, to hand over the property to a larger company, with the view of immediately erecting a 20-stamp battery and increasing it to 50 stamps at the earliest convenient date."

The prospectus also gave the date of and parties to the contract with the syndicate, and stated the amount and particulars of the consideration for the sale. Inspection of the contract by intending shareholders was also offered.

In the winding-up of the company a misfeasance summons was taken out by creditors of the company against G. D. Simpson in respect of two matters. On the first claim, the particulars of which need not be considered for the purposes of this report, the applicants were successful. The other claim was to have the respondent declared liable to pay certain sums of cash, and to account for certain fully paid shares in the company, on the ground that the same were a profit made by the respondent as a promoter of the company without its knowledge or sanction on its acquiring the mining properties from the syndicate, in which the respondent was interested, and that he might be ordered to refund the cash and pay the value of the shares.

Swinfen Eady, Q.C., and *J. W. Manning*, for the applicants. The respondent was a promoter of the company, and also a director of it and in a fiduciary position towards it, and yet he made a secret profit at the expense of the company. The directors were not an independent board, and therefore no knowledge on their part as to the fact or amount of profit made on the resale of the property can be set up. Any disclosure which can be relied on by the respondent must be shewn to have been made to the intending shareholders in the company. Disclosure of the fact that a profit was being made on the sale is not clearly made, but, assuming that the fact is shewn, that is not enough, for the amount of profit must be shewn: *In re Olympia, Limited* (1), on appeal *Gluckstein* v. *Barnes*. (2) The same case shews that it is immaterial that when the promoters purchased with the view of reselling to a company at a profit, as was the case here, no particular company was in existence or contemplation.

(1) [1898] 2 Ch. 153. (2) [1900] A. C. 240.

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Cases may, no doubt, be cited to the effect that the amount of profit need not be stated, provided the fact that a profit is being made is disclosed; but these cases were decided before, and are inconsistent with *Gluckstein* v. *Barnes*. (1)

[They also referred to *In re Englefield Colliery Co.* (2); *In re Rotherham Alum and Chemical Co.* (3); *Erlanger* v. *New Sombrero Phosphate Co.* (4)]

Jenkins, Q.C., and *M. Muir Mackenzie*, for the respondent. The respondent was not a director of the company when he acquired his interest in the property which was afterwards sold to it; and when the company purchased it, the fact of his interest was disclosed, and he was not bound to disclose the amount of profit: *In re Cape Breton Co.* (5), affirmed as *Bentinck* v. *Fenn*. (6)

The claim, to be successful, must be founded on trusteeship for the company by the person retaining the profit, or on fraud, as in *In re Hereford and South Wales Waggon and Engineering Co.* (7) But the respondent was not a trustee for the company when he acquired an interest as one of the vendors, and fraud is not charged against him.

In re Cape Breton Co. (5) was followed in *Ladywell Mining Co.* v. *Brookes*. (8) There it was not proved that the vendors, when they purchased the mine which they afterwards sold at a profit to a company of which some of them became directors, were promoters of the company, but it was held that, assuming a breach of duty had been committed by concealing the fact that the vendors were owners of the property, the remedy, if any, was rescission, and that an action to recover the profit would not lie. The respondent was not a promoter or in a fiduciary position when the property was purchased by the syndicate: *Gover's Case* (9); and it was unnecessary to state the amount of profit on the resale to the company.

Gover's Case (9) and *In re Cape Breton Co.* (5) and *Ladywell*

(1) [1900] A. C. 240.
(2) (1878) 8 Ch. D. 388.
(3) (1883) 25 Ch. D. 103.
(4) (1878) 3 App. Cas. 1218.
(5) 29 Ch. D. 795.
(6) (1887) 12 App. Cas. 652.
(7) (1876) 2 Ch. D. 621.
(8) 35 Ch. D. 400.
(9) 1 Ch. D. 182.

Mining Co. v. *Brookes* (1) were all referred to by the judges constituting the Court of Appeal in *In re Olympia, Limited* (2), but not one of the cases was dissented from. The same three cases were cited to the House of Lords in *Gluckstein* v. *Barnes* (3), but were not then judicially commented on. The decision of the House in fact rested on misrepresentation.

A Court of first instance is bound by the cases cited, which are all decisions of the Court of Appeal.

Swinfen Eady, Q.C., in reply. Lord Herschell says that a director is in the position of an agent, "and undoubtedly if he filled any fiduciary position towards them at the time when he purchased this property he would be bound to pay to the company the difference between the price at which he purchased it, and the price at which it was sold to the company": *Bentinck* v. *Fenn.* (4)

As shewn by *In re Olympia, Limited* (2), the respondent was in a fiduciary position to this company at the time when the syndicate acquired this property.

But it cannot now be contended that it is sufficient for a promoter to state the fact without the amount of profit. Lindley M.R. in *In re Olympia, Limited* (5), speaks of its being the duty of a promoter "to disclose what profits he has made." And in the same case Collins L.J. says that the proposition in *In re Cape Breton Co.* (6), that where rescission is impossible and the secret profit is unascertainable no other remedy lies open to the company, was not approved by Lord Herschell in *Bentinck* v. *Fenn* (7), and was explained in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (8) as resting on special facts. (9)

Gover's Case (10), *In re Cape Breton Co.* (6), *Ladywell Mining Co.* v. *Brookes* (1), and *Erlanger* v. *New Sombrero Phosphate Co.* (11) were all pressed, but in vain, upon the House of Lords in *Gluckstein* v. *Barnes.* (3)

Lydney and Wigpool Iron Ore Co. v. *Bird* (8) is in the

(1) 35 Ch. D. 400.
(2) [1898] 2 Ch. 153.
(3) [1900] A. C. 240.
(4) 12 App. Cas. at p. 658.
(5) [1898] 2 Ch. at p. 166.
(6) 29 Ch. D. 795.
(7) 12 App. Cas. 652.
(8) (1886) 33 Ch. D. 85.
(9) [1898] 2 Ch. 178, 179.
(10) 1 Ch. D. 182.
(11) 3 App. Cas. 1218.

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applicants' favour, for in that case it was held that the person who promoted the company was liable to repay the portion of the purchase-money paid by the company, which without its knowledge had gone into his pocket. It was there pointed out that the principles of the law of agency apply to a promoter of a company which has not yet come into existence. An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; it is not enough to disclose that he has an interest: *Dunne* v. *English*. (1)

WRIGHT J., after dealing with the first part of the summons, proceeded as follows:—A much more serious and more difficult question arises on the other part of the summons. To me it is clear that the findings of fact, or the considerations upon which the Court of Appeal and the House of Lords mainly proceeded in *Gluckstein's Case* (2), have no counterpart in this case. There were two matters which lay at the root of the judgments in the Court of Appeal and the House of Lords in *Gluckstein's Case*. (2) One was the conclusion at which the Lords Justices and the Law Lords arrived, that, from the beginning, from the date of the earliest agreement, there was a commencement of the promotion of the company which was ultimately promoted. I need not go into the language in which they described that; in effect they said that the property was there acquired by the vendors at such a time, and acquired by them in such a way that at the time they acquired it they ought to be regarded as in some sense promoters of the vendee company. The second ground upon which the decision proceeded was an express and fraudulent misrepresentation made by the vendors to the vendee company. Neither of those circumstances is here. To me it is plain, looking at the prospectus of the vendor syndicate, dated February, 1895, and the prospectus of the Lady Forrest Company, dated October, 1895, that when the vendors in the present case acquired the mine they acquired it absolutely and entirely for themselves, and not in the least degree with any then present intention of selling it to any other

(1) (1874) L. R. 18 Eq. 524. (2) [1900] A. C. 240.

company, or of forming any other company whatever. It is quite true that they regarded it as a possible event in the future that another company with a larger capital would be formed, but they plainly contemplated working the mine themselves for their own profit in the first instance, and only forming another company if they wanted further working capital, or found that the matter grew so large that they could sell it at a greatly enhanced price to another company. There was no present intention then of doing anything of the kind. Therefore, to my mind, it is impossible to regard them as having acquired the property in question in such a way as to affect their acquisition with the character of an acquisition by promoters of an intending company. Therefore they cannot be said to have been in a fiduciary relation to the vendee company at that time. Nor is there here any express fraud or misrepresentation such as there was in *Gluckstein's Case*. (1) Although I shall have to say that Mr. Simpson and the other directors, members of the syndicate, were guilty of a breach of duty in the matter, it appears to me that they were not guilty of anything which in any ordinary sense of the word can be described as fraud at all. They disclosed the fact that they were directors of the vendor syndicate, and thereby they necessarily disclosed that they were making some profit. It is quite true they did not disclose what profit they were making, and in that, as it seems to me, they were wrong and guilty of a breach of duty. But that is quite a different thing, as is pointed out, I think, in *In re Englefield Colliery Co.* (2), from such a gross fraud as there was in *Gluckstein's Case*. (1) Then comes this question: If *Gluckstein's Case* (1) does not apply, can Mr. Simpson be held liable on any general ground? I confess that, if I had been permitted to do such a thing, I should have agreed with what Bowen L.J. said in his dissenting judgment in *In re Cape Breton Co.* (3), but it seems to me that I am not at liberty to do so. I should have thought that circumstances existed here which were enough to fix Mr. Simpson with liability. He was one of the directors of the Lady Forrest Company, and one of the promoters of it.

(1) [1900] A. C. 240. (2) 8 Ch. D. 388. (3) 29 Ch. D. 795.

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As director of that company he assisted in paying out of its coffers 75,000*l.*, or the value of 75,000*l.*, part of which was for himself and his co-syndicators, and he never told the Lady Forrest Company how much he and his co-syndicators were to get in consequence of the act by which he, their director, was binding them. In advising the purchase by the Lady Forrest Company, as a director of that company, he was not acting independently or disinterestedly; he was making for himself a profit—not in one sense a dishonest profit, because it appears that the shares of the syndicate stood at a very high rate. I do not say that the profit that he was making for the syndicate was out of proportion to the profit made in similar cases, but I think he ought to have disclosed it, and also that he could not justify paying out the money of the company when he did not bring an independent and disinterested mind to the question. But is that enough? It seems to me that I am precluded by three cases from holding that it is enough. There is the decision of the other two members of the Court of Appeal in *In re Cape Breton Co.* (1), which has been sometimes explained as proceeding upon peculiar facts; there is the case of *Ladywell Mining Co.* v. *Brookes* (2), which has not been so explained; and there is the statement of Lord Cairns in *Erlanger* v. *New Sombrero Phosphate Co.* (3)—all of which appear to me to go to this result: that although there is a breach of duty in such a case sufficient to entitle the vendee company to rescind or repudiate the contract if matters have not been too much altered in the meantime, nevertheless there is no sufficient ground for requiring a person in the position of Mr. Simpson to repay the profit or the benefit that he has received out of the sale. It is quite true, I think, that the cases on which so much reliance has been placed on Mr. Simpson's behalf have been to some extent doubted, perhaps even questioned, in later cases, and certainly some of them have been more or less criticised, but they have been cited and discussed, and have not been expressly dissented from, still less overruled, in any case to which I have been referred.

(1) 29 Ch. D. 795. (2) 35 Ch. D. 400.
(3) 3 App. Cas. 1218, 1235.

Under those circumstances it seems to me that I have nothing to do except to follow what I believe to be the effect of those cases, and to say that, on this part of the case, the summons must be dismissed.

Solicitors for applicants: *Dale, Newman & Hood.*
Solicitors for respondent: *Stephenson, Harwood & Co.*

F. E.

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[1899 A. 1680.]

SAME *v.* SAME.

[1900 A. 722.]

Corporation—Railway Company—Promoters—Landowner—Notice to Treat—Counter-notice—Withdrawal of Notice to Treat—Successive Notices to Treat—Compensation—Arbitration—Compulsory Powers, Exhaustion of—Ultra vires—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 92.

The compulsory powers of promoters, under s. 18 of the Lands Clauses Consolidation Act, 1845, to purchase land of a particular landowner, are not exhausted by a single notice to treat for part of his land. If that notice is validly withdrawn, as it may be, for instance, upon a counter-notice by the landowner under s. 92 to take the whole of his land, the promoters are in the same position as if no notice to treat had been given, and may therefore give a second notice in respect of the land comprised in the first notice, or any part thereof, and, upon that being validly withdrawn, may give a third notice, and so on during the time limited by their special Act for the exercise of compulsory powers; the result being that they are entitled to proceed to the assessment of compensation upon the latest notice to treat not validly withdrawn.

THE plaintiffs were owners of large works near Bristol consisting of collieries, a blast furnace, coke ovens and brick kilns, collectively known as "The Ashton Vale Coal and Iron Works," and also of extensive rolling mills known as "The Ashton Vale Rolling Mills," which adjoined and communicated with the collieries. Part of the works consisted, as the plaintiffs

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contended, of a wharf and landing stage on the banks of the river Avon connected with the rest of the works by a tramway, also said to form part of the works.

By the Bristol Dock Act, 1897 (60 & 61 Vict. c. ciii.), which incorporated the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the corporation of Bristol were empowered to take lands for the purposes of the works authorized by their Act, their power to take lands compulsorily being limited to three years from the passing of the Act.

On May 2, 1899, the corporation served the plaintiffs, under s. 18 of the Lands Clauses Act, with a notice of that date to treat in respect of the wharf, landing stage, and part of the tramway, as shewn on a plan attached to the notice. On May 18, 1899, the plaintiffs served the corporation with a counter-notice, under s. 92 of the same Act, requiring them to take the whole of the Ashton Vale Rolling Mills on the ground that the premises comprised in the notice to treat formed part of the mills; and on June 2, 1899, they served the corporation with a notice to have the amount of compensation in respect of the whole of the mills settled by arbitration. The corporation then served the plaintiffs with a notice dated November 27, 1899, requesting them to appoint an arbitrator on their part to assess compensation in respect of the premises comprised in the notice to treat of May 2. This notice of November 27 contained no reference whatever to the plaintiffs' counter-notice.

On December 8, 1899, the plaintiffs issued the writ in the first of the above actions claiming a declaration that they ought not to be required to sell or convey to the defendants, the corporation, that part only of the plaintiffs' manufactory, the Ashton Vale Rolling Mills, which was comprised in the notice to treat of May 2, nor any part of the said manufactory, the plaintiffs being ready and willing to sell the whole, and an injunction to restrain the defendants from taking proceedings to assess compensation in respect only of the premises comprised in such notice to treat, and from entering and taking possession upon the footing of such notice. That writ was served on the corporation on December 11, 1899, and on the

following day, December 12, the corporation served the plaintiffs with a notice withdrawing the original notice to treat of May 2, and on December 16 served them with a second notice, dated the 12th, to treat in respect of the same premises.

The plaintiffs then served the corporation with a notice of motion dated December 18, 1899, for an interim injunction to restrain them from taking any proceedings to assess compensation in respect of the premises comprised in the notice to treat of May 2 without purchasing the whole of the mills, and from taking any other proceedings to obtain possession of part only thereof.

On January 4, 1900, the plaintiffs served the corporation with a second counter-notice; but this counter-notice stated that the premises comprised in the second notice to treat of December 12, 1899, formed part not only of the Ashton Vale Rolling Mills but also of the Ashton Vale Coal and Iron Works, and accordingly required the corporation to take the whole of the mills and works. On February 10, 1900, the corporation served the plaintiffs with notice of their intention to summon a jury to assess the compensation to be paid under the second notice to treat of December 12, 1899.

On February 19, 1900, the plaintiffs served the corporation with notice, under protest and without prejudice, signifying their desire to have the compensation payable under the second notice to treat of December 12, 1899, and the counter-notice of January 4, 1900, settled by arbitration.

On February 26, 1900, the motion for injunction in the first action was heard by Byrne J., but before he had pronounced judgment the corporation on March 5 withdrew their second notice to treat of December 12, 1899, and the next day served the plaintiffs with a third notice, dated March 5, to treat in respect of the premises comprised in the former notices to treat but to the exclusion of two pieces of land numbered 12 and 15 on the said plan, both of which were comprised in the former notices to treat, and which, as the corporation contended, represented easements and not land.

By a third counter-notice, dated March 22, 1900, and served by the plaintiffs on the corporation under protest and without

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prejudice, the plaintiffs again required the corporation to take the whole of their mills and works.

The motion for injunction in the first action was disposed of by Byrne J. on April 26, 1900, when he held that the site of the tramway did not form part of the Ashton Vale Rolling Mills, and refused an injunction. Thereupon the plaintiffs, contending that the tramway as well as the other premises comprised in the several notices to treat formed part of the Ashton Vale Coal and Iron Works as well as of the Ashton Vale Rolling Mills, on May 11, 1900, issued the writ in the second of the above actions claiming a declaration that they ought not to be required to sell or convey to the defendants, the corporation, that part only of the plaintiffs' manufactory or manufactories, known as the Ashton Vale Coal and Iron Works and the Ashton Vale Rolling Mills, which was comprised in any notice to treat theretofore served by the defendants upon the plaintiffs, nor any other part or parts only of the said manufactory or manufactories, the plaintiffs being ready and willing to sell the whole; and an injunction to restrain the corporation from taking proceedings for the assessment of compensation in respect of part only, and from entering upon and taking possession of part only.

On May 24, 1900, the corporation served the plaintiffs with a notice dated May 23, 1900, of their intention to summon a jury to assess compensation under their third notice to treat of March 5, 1900, and on June 2, 1900, the plaintiffs served the corporation with a notice, under protest and without prejudice, signifying their desire to have the compensation in respect of the mills and works comprised in their third counter-notice settled by arbitration.

On July 6, 1900, the corporation gave the plaintiffs notice appointing an arbitrator to settle the compensation in respect of the premises comprised in the third notice to treat of March 5, 1900, and requesting the plaintiffs to appoint an arbitrator on their behalf.

On July 17, 1900, the plaintiffs gave the defendants notice of motion in the two actions, which had been consolidated, for an injunction to restrain the defendants from taking further

proceedings under their notice to treat of March 5, 1900. Upon this motion coming on for hearing before Byrne J., the plaintiffs' counsel stated that they proposed to shew that the corporation had no statutory powers, but the learned judge considered that, on the statement of claim which the plaintiffs had delivered in the two consolidated actions, they could not raise that case on the motion, whereupon the motion stood over.

On July 19, 1900, the plaintiffs, in pursuance of the corporation's notice of July 6, 1900, gave the latter notice appointing an arbitrator, but under protest and without prejudice to the two actions.

On July 28, 1900, the plaintiffs issued a writ in a third action (*Ashton Vale Iron Co., Ld.* v. *Mayor, &c., of Bristol*, [1900 A. 1136]) claiming a declaration that the corporation had no statutory powers whatever to take compulsorily any of the plaintiffs' lands; and on the same day they gave notice of motion for an injunction to restrain the corporation from taking any of the plaintiffs' lands.

The two motions, that in the two consolidated actions and that in the third action, came on together before Byrne J., who, on August 11, 1900, gave judgment deciding that, in his opinion, the corporation had no statutory powers, but that, if they had, the notice to treat of March 5, 1900, was a good and valid notice upon which the corporation were entitled to proceed, and he made one order on both motions granting an injunction restraining the corporation from proceeding. The corporation appealed from that order, and the plaintiffs gave a notice of cross-appeal to vary the order and to have the corporation restrained from taking further proceedings under their third notice to treat, of March 5, 1900, on the ground that the first notice to treat, of May 2, 1899, was effectual and could not be withdrawn, and that therefore the subsequent notices to treat were invalid.

The corporation's appeal was heard on November 28, 1900, and the Court of Appeal, consisting of Lord Alverstone C.J., Rigby and Vaughan Williams L.JJ., in considered judgments delivered on December 17, 1900, held, Vaughan Williams L.J.

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dissenting, that, according to the true construction of their special Act, the corporation had statutory powers to take the plaintiffs' land compulsorily, and allowed the appeal with costs both on appeal and below, at the same time giving the plaintiffs an opportunity of bringing on their cross-appeal.

The cross-appeal was accordingly set down, and was heard on December 20, 1900, and January 11, 1901, before Rigby and Romer L.JJ.

A. T. Lawrence Q.C., and *Leslie*, for the plaintiffs. It is submitted that when a notice to treat under s. 18 of the Lands Clauses Consolidation Act, 1845, has once been given, the promoters of the undertaking have exhausted their compulsory powers; and that if they withdraw that notice they cannot give a fresh notice in respect of the same property or a part of it.

A notice to treat cannot be withdrawn, except when a counter-notice to take the whole of the land, and not only the part comprised in the notice to treat, has been given by the landowner under s. 92: in that case it may be withdrawn: *Tawney* v. *Lynn and Ely Ry. Co.* (1); *Reg.* v. *London and South Western Ry. Co.* (2) The mere service of a notice to treat does not constitute a contract by the owner of the land for the sale of it: *Haynes* v. *Haynes.* (3)

[*Freeman, Q.C.*, for the corporation, referred to *Harding* v. *Metropolitan Ry. Co.* (4)]

When a good notice to treat has been given and withdrawn because the promoters are not willing to comply with the landowner's counter-notice requiring them to take the whole of his property, their power to take the land compulsorily is exhausted, and they cannot serve a fresh notice to treat. The Act does not say that the power may be exercised from time to time, otherwise the landowner would be kept in suspense during the whole period limited by the special Act for the completion of the works. It is clear from *Tawney* v. *Lynn and Ely Ry. Co.* (1) that repeated notices to treat cannot be effectually given.

(1) (1847) 16 L. J. (Ch.) 282.
(2) (1848) 12 Q. B. 775.
(3) (1861) 1 Dr. & Sm. 426.
(4) (1872) L. R. 7 Ch. 154.

Statutory powers must be construed strictly, and any doubt with regard to them must not be solved in a manner to give the promoters any power that is not most clearly and expressly defined in the statute: *Simpson* v. *South Staffordshire Waterworks Co.* (1); *Webb* v. *Manchester and Leeds Ry. Co.* (2) Where a valid notice has been given to take part of a property, and on that a valid counter-notice to take the whole has been given, the counter-notice is substituted for the original notice: *Pinchin* v. *London and Blackwall Ry. Co.* (3) Here, after the counter-notice had been given the corporation could have elected either to take the whole of the plaintiffs' property or to leave it, and when once, by withdrawing their notice, they had elected not to take it, their election was determined for ever: Comyn's Dig. 5th ed. vol. iii., "Election" C. 1, C. 2; *Clough* v. *London and North Western Ry. Co.* (4); *Scarf* v. *Jardine.* (5)

At any rate, even assuming that their compulsory powers were not exhausted by their first notice, the corporation could not withdraw it after they had taken proceedings under the counter-notice by serving the plaintiffs with notice to appoint an arbitrator for the purpose of assessing the compensation, and the plaintiffs had appointed an arbitrator.

Cripps, Q.C., Hon. A. Lyttelton, Q.C., Freeman, Q.C., and *E. S. Ford,* for the defendants, the corporation. There is nothing in the Lands Clauses Act saying that, when a notice to treat has been given and withdrawn, the promoters have exhausted their compulsory powers and cannot give a second notice. The result of the withdrawal of the original notice, whether upon a counter-notice or on the ground of mistake, informality, or otherwise, is to relegate the parties to their original positions, and the same with regard to a second notice and its withdrawal. The landowner is sufficiently protected by the limitation in the special Act of the period for the exercise by the promoters of their compulsory powers.

A. T. Lawrence, Q.C., in reply.

(1) (1865) 34 L. J. (Ch.) 380.
(2) (1839) 4 My. & Cr. 116, 120.
(3) (1854) 5 D. M. & G. 851, 863, 865.
(4) (1871) L. R. 7 Ex. 26, 34, 35.
(5) (1882) 7 App. Cas. 345, 353, 360.

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RIGBY L.J. The view I take of the notices to treat is this. Notice No. 1 was a valid notice; it may or may not have been advantageous for the corporation as being the best notice they could have given under the Act, but it was a valid notice. It was met by a counter-notice requesting them to take the whole of the property, including a very large amount of property not comprised in the notice. That entitled the corporation to withdraw their notice. I do not think it necessary here to consider what the exact meaning of withdrawing a notice may be in all possible cases—whether in some cases it might not be satisfied by declining to proceed; but, at any rate, the corporation were entitled to withdraw their notice, and did so. It seems to me, in that state of circumstances, they are relegated to the position in which they were before the first notice to treat was served; and if so—and so far as regards this motion I hold it was so—they had the right to serve the second notice. That second notice was in like manner met by a counter-notice which entitled the promoters, the corporation, to withdraw, and it was, in its turn, followed by a withdrawal. The result was the same as in the first instance. Then the third notice was given, which is now, as I understand, the only notice in existence having any force or value whatsoever. The previous notices have been swept away one after the other, and I do not see why the corporation, having served the third notice, should not be able to proceed upon it.

With reference to the small pieces, numbered 12 and 15, I am of opinion that there is no notice in existence, because notice No. 3 does not comprise those small portions. How that will be dealt with ultimately I cannot say, but I think it clear that there is now no notice in existence with regard to those pieces, and the result is that there is a valid notice, which valid notice may be proceeded with for the benefit of, and of course at the risk in every way of, the corporation, it being understood and decided that Nos. 12 and 15 are not being dealt with.

ROMER L.J. The only point that I am concerned with, as I did not form part of the Court which decided the main appeal, is with regard to the cross-notice of appeal given by the

plaintiffs. That raises the simple question whether or not the defendants ought to be allowed to go on with their third notice to treat. It is said in the first place that they ought not to be allowed to go on with that third notice to treat, because their powers to give any notice to treat were exhausted when they had given their first notice; and that, after they had given their first notice and withdrawn it, their powers to take the land at all were at an end, and they could no longer exercise any powers whatever as against the plaintiffs. In my opinion that argument is not well founded.

It is quite true that, if promoters give a landowner notice to treat with regard to his land, they cannot go back from that notice if the landowner insists upon holding them to it; but it is otherwise if the landowner for any reason either chooses to allow them to withdraw the notice or admits that it is informal or bad in any way. In that case I can see no reason why, if the notice can be validly withdrawn and is validly withdrawn, and the time is still running within which the promoters can exercise their right of taking the land, they should not exercise that right at any time within the time limited merely because they had previously served a notice which was validly withdrawn. It is admitted that in one case where promoters have given a notice to treat they can withdraw that notice as against the landowner, and that is if, when they have given a notice to treat for certain specified lands, the landowner gives a counter-notice requiring them to take the whole of the lands of which part only is included in the notice to treat. In that case the promoters may "withdraw" their notice, as it is termed, it being settled law that in such a case the promoters are entitled to withdraw their notice.

Now here, with regard to their first notice to treat, the promoters were met by a counter-notice of the kind I have mentioned, given by the plaintiffs. The defendants were therefore in the position of being able to withdraw their first notice, and they did so. What is the effect of that? It is, to my mind, to put them in the same position as if no such notice had been given. It cannot be said that the promoters, by withdrawing the notice, have elected, during the remainder of

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the time within which they have the power to take the lands, never again to exercise their powers. In my opinion you cannot gather that any such election has been made from the fact of withdrawal: at the most, all you could say would be this, that the promoters had elected not at that time to go on with the purchase of the lands at the risk of having to take the lands included in the counter-notice. I can see no reason why they might not say at a later time, within the time limited for their taking these lands, "We are now quite willing to give a fresh notice to take the same lands, and we will run the risk of having to take the extra lands if we are obliged to do so." And, moreover, to my mind it is reasonably clear that the argument of the appellants in the present case cannot be sustained, for, pushed to its fullest extent, it would amount to this—that where a notice to treat is given by promoters, and the notice is alleged by the landowner to be invalid, and that allegation is acted upon by the promoters who withdraw the notice, the promoters' power to take all the lands is absolutely gone if it should turn out that the parties were mistaken and that the original notice was in fact valid. I think that shews the argument must be unsound, leading as it would to such a ridiculous result. The fact is that whenever the promoters are in a position to withdraw their notice, they are, as I have already said, in the same position as if no such notice had been given at all. And I think that is further borne out by considering what in fact a notice to treat is—that it is an intimation by the promoters that they intend to take the lands, and want the money that is to be paid to the landowners duly ascertained so that the purchase may be completed.

Now here, the promoters being, as I have said, in a position to withdraw their first notice and to give a fresh notice, how do matters stand with regard to the second notice they gave? That seems to me to be covered by what has already been said with regard to the first notice. The plaintiffs, the landowners, again required the promoters to take under the provisions of the Lands Clauses Act the whole of their rolling mills and works. On receiving that counter-notice, it appears to me that the defendants were in the same position as they were with

regard to the counter-notice given to their first notice, that is, they were entitled to say, "Very well; we will withdraw our second notice."

Then the defendants served the third notice, and I cannot see any reason why this third notice should not be held to be a perfectly good notice. But I may observe that this third notice does not contain any reference to the pieces of land Nos. 12 and 15 comprised in the two former notices, and therefore does not cover them. However, I see no sufficient reason why the corporation should not be allowed to proceed upon this third notice.

There was a further point taken on behalf of the appellants, the plaintiffs, to which I ought to refer. It was said that, with regard to the first notice given by the corporation, a step had been taken by them which recognised the validity of the counter-notice the plaintiffs had given to that first notice, and that they were therefore bound by that first notice. In my opinion that is not so. On looking at the notice of November 27, which is the one relied upon by the appellants, it will be seen that, so far from recognising the counter-notice in question, the corporation altogether disregarded that counter-notice, and proceeded to take a step on the footing that it had no effect whatever. So that in no way can it be said that by serving that notice of November 27 the corporation took any step with regard to the counter-notice which rendered it impossible for them afterwards to resile from the position or to withdraw their first notice to treat.

On these grounds I agree in thinking that the cross-appeal fails and should be dismissed.

Solicitors: *Robbins, Billing & Co., for Abbot, Pope, Brown & Abbot, Bristol; Robins, Hay, Waters & Hay, for D. T. Burges, Bristol.*

G. I. F. C.

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[1899 C. 2046.]

Municipal Corporation — City of London — Electric Lighting — Contract — Validity — Corporation Shareholders — Prohibition — Penalty — Members of Corporation "directly or indirectly interested or concerned in" Contract — Novation — Construction of Statute — Ejusdem Generis — City of London Sewers Act, 1848 (11 & 12 *Vict. c. clxiii.*), *ss.* 33–42, 116 — *City of London Sewers Act*, 1851 (14 & 15 *Vict. c. xci.*), *s.* 53.

By ss. 33–42 of the City of London Sewers Act, 1848, the Commissioners of Sewers (whose statutory powers were afterwards vested in the mayor and corporation of the City of London) were empowered, under certain conditions and safeguards, to enter into contracts for the execution of works authorized by the Act, or for the supply of materials or labour, "or for any other matters or things whatsoever necessary for enabling them to carry the purposes of the Act into effect," and, in particular, s. 42 enacted that "no person, being a Commissioner, or a member of the Court of Aldermen or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void," and that the Commissioner, &c., so interested or concerned should for every such offence forfeit 100*l.* By s. 116 the Commissioners were empowered to enter into contracts with gas companies and other persons to supply gas, "or to light the City by any other mode," "lighting contracts" not having been specifically mentioned in any previous section.

The Commissioners subsequently entered into three electric lighting contracts, two of them being with the Brush Company, and one with a syndicate. At the date of the contracts some of the Commissioners, aldermen, and common councilmen were shareholders in the Brush Company, but not in the syndicate. Shortly afterwards the company and syndicate assigned their contracts to the plaintiffs, another electric lighting company, whose shareholders included several Commissioners, aldermen, and common councillors :—

Held, by the Court of Appeal, reversing Farwell J., (1.) that s. 42 applied to every kind of contract under the Act, including any lighting contract under s. 116, and was not restricted to "construction contracts" under the sections preceding s. 42; and (2.) that consequently s. 42 rendered the two contracts with the Brush Company "null and void," ab initio, by reason of there being Commissioners, &c., "interested" therein as shareholders of the company at the date of the contracts, but

that the contract with the syndicate was good in its inception through there being no Commissioner, &c., interested therein at the date thereof, and that its subsequent assignment to the plaintiff company, though that company included Commissioners, &c., among its shareholders, did not constitute such a novation of the contract as to render it null and void within the section.

BY the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 5, the sole power of cleansing, "lighting," paving, &c., the City of London was vested in the mayor, commonalty, and citizens of the City, to be executed by a body to be called "The Commissioners of Sewers of the City of London." Sects. 6 to 32, both inclusive, contained provisions for the appointment of the Commissioners and their officers. Sect. 33 enacted that "it shall be lawful for the Commissioners, or any committee appointed by them, to enter into and contract in the name of the Commissioners with any persons for the execution of any works directed or authorized by this Act to be done by the Commissioners, or for furnishing materials or labour, or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect, in such manner, and upon such terms, and for such sums of money, and under such stipulations, regulations, and restrictions, as the Commissioners or such committee shall think proper." Sect. 34 enacted that "every such contract shall be executed by any seven or more of the Commissioners, or by the clerk of the Commissioners on their behalf, and also by the person contracting to perform the work or to supply the materials or labour mentioned therein." Sect. 35 required that before entering into "any contract" for the execution of works to the amount of 100*l.* the Commissioners should obtain an estimate. Sect. 36 required that before "any contract" to the amount of 200*l.* should be entered into, ten days' notice at the least should be given of its object in two London daily morning newspapers. Sect. 37 empowered the Commissioners to compound for the breach of "any such contract." Sect. 38 empowered them to employ upon their works any fit person, whether free of the City or not. Sect. 39 provided that during the execution of "any contract," the works in course of being done under "such

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contract," and all the materials brought upon the works, should be the property of the Commissioners. Sect. 40 directed how the Commissioners might sue or be sued, and how they might bring or continue any action. Sect. 41 provided that the Commissioners should not be personally liable under "any deed or contract by this Act authorized to be made by or on behalf of the Commissioners for any of the purposes of this Act."

Then s. 42 was as follows: "Provided also, and be it enacted, that no person, being a Commissioner, or a member of the Court of Aldermen, or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a Commissioner, or a member of the said Court of Aldermen, or of the Common Council, shall be so interested or concerned therein, shall for every such offence forfeit and pay the sum of 100*l.* to any person who shall sue for the same, to be recovered in any of the superior Courts by action of debt or on the case."

By s. 55 the Commissioners were empowered to contract for the supply of water for flushing sewers, and (s. 116) "to enter into contracts with such gas companies and other persons as they may think fit, to supply gas, or to light the City by any other mode"; also (s. 143) to contract with companies or persons authorized to take up any of the pavements or other formed surface of streets within the City, for the restoring of the same. By s. 264 the Act was to continue in force for two years from January 1, 1849. This latter section was repealed by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), an Act passed to continue the previous Act of 1848 and to alter and amend its provisions. The Act of 1848 was thus made perpetual.

Sect. 53 of the Act of 1851 enacted as follows: "That no person, being a Commissioner, who is a shareholder in, or

surveyor, solicitor, or agent for, any gas company, water company, paving company, or any work, undertaking, or speculation the contracting with or the promotion or carrying out of which shall be discussed at any meeting of the Commissioners, shall be eligible to sit or vote as a Commissioner while such subject is under the discussion of the Commissioners."

By a Provisional Order granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (No. 15) Act, 1890, and hereinafter called the "Central Order," power was given to the Brush Electrical Engineering Company, Limited, to supply electric lighting to the "central district" of the City; and by an agreement in writing, dated May 19, 1890, the Brush Company contracted with the Commissioners of Sewers to supply electric lighting to that district accordingly, for the term, at the rates and upon the conditions therein mentioned.

By another Provisional Order, confirmed by the same Confirmation Act, and hereinafter called the "Eastern Order," power was given to the Laing, Wharton, and Down Construction Syndicate, Limited, to supply electric lighting to the "eastern district" of the City; and by an agreement in writing of May 28, 1890, the syndicate contracted with the Commissioners for the electric lighting of that district.

By another Provisional Order, confirmed by the Electric Lighting Orders Confirmation Act (No. 10) Act, 1891, and hereinafter called the "Western Order," the western and central districts of the City were united into one district as the area of supply for the Brush Company under the Central Order and the Western Order; and by an agreement in writing of February 5, 1891, the Brush Company contracted with the Commissioners for the supply of electric lighting to the western district.

Neither of the Confirmation Acts contained any power for the company or syndicate to assign contracts.

On July 11, 1891, the plaintiffs, the City of London Electric Lighting Company, Limited, were incorporated under the Companies Acts, for the purpose (inter alia) of acquiring the above Provisional Orders and agreements; and by a deed of August 21, 1891, the Central and Western Orders, and the

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benefit of the two agreements of May 19, 1890, and February 5, 1891, were transferred and assigned by the Brush Company to the plaintiff company, who thereby covenanted with the Brush Company to perform the obligations of those two agreements, and to indemnify that company against all liability thereunder. By another deed of the same date, August 21, 1891, the Eastern Order and the benefit of the agreement of May 28, 1890, were in like manner transferred and assigned by the syndicate to the plaintiff company, who thereby covenanted with the syndicate to perform the obligations of that agreement, and to indemnify the syndicate against all liability thereunder.

The consent of the Commissioners to the transfers had been given, as required by the Provisional Orders, by a resolution dated June 23, 1891, agreeing to the report of their streets committee, which recommended to the Board of Trade "that the Commissioners see no objection to the transfers of the Provisional Orders and the respective contracts" to the plaintiff company, provided certain inquiries as to the subscription of capital and otherwise proved satisfactory. The Commissioners communicated the resolution to the undertakers, the contracting companies, adding "that the rights of the Commissioners under the respective contracts are to be maintained intact." The chairman of the Commissioners at the same time wrote to the Board of Trade that necessary inquiries were being made as to the constitution of the plaintiff company, and stating that probably a resolution of approval would be passed at the next meeting of the Commissioners. The inquiries proving satisfactory, a formal resolution was passed by the Commissioners on September 22, 1891, consenting to "the transfer of the three Provisional Orders," but not mentioning the contracts, and this resolution was communicated to the Board of Trade, who thereupon gave their consent to the transfers as required by the Provisional Orders.

By the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), the Commission of Sewers was dissolved, and its property was transferred to and vested in the mayor, commonalty, and citizens of London, in whom its powers were also vested, but to be exercised through the Common Council.

The City had been lighted under the above contracts since 1891, but in 1898, in consequence of the following facts coming to the knowledge of the corporation, they repudiated the contracts. It seemed that at the date of the two contracts with the Brush Company, of May 19, 1890, and February 5, 1891, a common councillor and a Commissioner of Sewers, another common councillor who was not a Commissioner, and the then Lord Mayor, who was also an alderman and, as Lord Mayor, an ex-officio Commissioner, were shareholders in that company. At the date of the contract with the Laing Syndicate, dated May 28, 1890, no Commissioner, alderman, or common councillor was a shareholder in the syndicate; but at the date of the transfer of August 21, 1891, by the syndicate to the plaintiff company, several Commissioners, aldermen, and common councillors were shareholders in the plaintiff company.

Under these circumstances the Corporation of London repudiated all three contracts as being "null and void" within s. 42 of the Act of 1848; whereupon the plaintiff company brought the present action against the corporation, claiming a declaration that each of the contracts was valid and subsisting, and binding upon the defendants.

It appeared that a section similar to s. 42 of the Act of 1848 had been inserted in various Acts of Parliament relating to the City of London, commencing as far back as the City of London Sewers, &c., Act, 1766 (6 Geo. 3, c. 26), and that it was, in short, a common form section.

The action was tried before Farwell J., who, in a considered judgment delivered on May 3, 1900, decided in favour of the plaintiffs on two grounds, first, that the contracts referred to in s. 42 of the Act of 1848 included what he termed "construction contracts" only, under ss. 33–42, and did not include contracts for the lighting of the City with electric light under s. 116; and secondly, that, upon the true construction of s. 42 when read in connection with s. 53 of the Act of 1851, a shareholder in a company with which the Commissioners had made a contract was not a person "directly or indirectly interested or concerned in" the contract within the meaning of s. 42.

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The defendants, the corporation, appealed.

The appeal was heard on January 21, 22, 1901.

Swinfen Eady, Q.C., Danckwerts, Q.C., and *A. J. Walter*, for the corporation. It is submitted that the view of the learned judge on both the points on which he decided in favour of the plaintiffs was erroneous.

On the first point, s. 42, upon its true construction, applies to all contracts with the Commissioners, and is not limited to "construction contracts." The words are wide enough to include all contracts. The Act contains no set of clauses applying to contracts for works as distinguished from contracts for supply, and the distinction taken by Farwell J. cannot be maintained.

On the second point, if any one can be said to be "interested or concerned in" a contract entered into by a company, surely a shareholder in the company must be so; he is directly interested in the contract and in the profit to be derived from it. And it does not at all follow that because a Commissioner who is a shareholder in a company with which it is proposed that the Commissioners shall contract, is, by s. 53 of the Act of 1851, expressly prohibited from voting as a Commissioner while the subject is under the discussion of the Commissioners, he is not a person "interested" within the meaning of s. 42 of the Act of 1848. Sect. 53 of the Act of 1851 does not repeal but it extends s. 42 of the previous Act. The object of both sections is to secure that persons who have to decide upon the acceptance of contracts shall be persons who not only have no interest in any contract, but are unbiassed in their discussion and votes upon it. A clause similar to s. 42 is to be found in all the previous Acts relating to the City of London, so as to prevent any person connected with the corporation having any voice in deciding upon the acceptance of a contract for works to be undertaken for the corporation, where that person is in any way himself interested in the contract. This is only in accordance with the well-recognised principle that no man can be allowed to sit as a judge in his own case: *Dimes* v. *Grand Junction Canal Proprietors* (1); *Todd* v. *Robinson*. (2)

(1) (1852) 3 H. L. C. 759, 786. (2) (1884) 14 Q. B. D. 739.

In the latter case, which was under s. 193 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the benefit accruing to the "officer concerned or interested," within that section, under the contract there in question was merely nominal, and yet the Court of Appeal held that he had brought himself within the penalties imposed by the section. The learned judge below seems to have been too much influenced by the severity of the penalty in s. 42 to give the natural inference to the words of the section.

Cripps, Q.C., and *Roskill*, for the plaintiffs. We submit that the learned judge was right in limiting s. 42 of the Act of 1848 to one particular class of contracts—"construction contracts"—falling under the group of ss. 33–42, and not to the second class of contracts—for the supply of water for flushing sewers under s. 55, or for the supply of gas or other illuminant for lighting the City under s. 116. Sect. 42 does not really deal with a "shareholder's" interest at all; that is dealt with by s. 53 of the Act of 1851, prohibiting a "Commissioner" (it does not mention an alderman or common councillor) from sitting or voting at the discussion of a contract with a company in which he is a shareholder. That section is intended to relax the stringency of s. 42. If s. 42 included a "shareholder," s. 53 was useless, for any such contract would at once be rendered void by the fact of the Commissioners holding shares in the contracting company. *Todd* v. *Robinson* (1) was a case under s. 193 of the Public Health Act, 1875, but is now, by reason of s. 2 of the Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53), no longer law. *Dimes* v. *Grand Junction Canal Proprietors* (2) only decided that a judge could not sit as a judge in his own cause: it did not decide that the mere fact of a judge being a shareholder in a contract upon which he had to decide ipso facto rendered that contract null and void. At all events, s. 42 cannot apply to the syndicate contract.

[They also mentioned s. 22 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and s. 46 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).]

Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

(1) 14 Q. B. D. 739.

(2) 3 H. L. C. 759, 786.

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Feb. 22. RIGBY L.J. After careful consideration of the provisions of the Act of 1848, of the judgment of Farwell J., and of the arguments addressed to us, I am quite unable to concur in the construction put upon the Act by the learned judge. This, speaking broadly, consists in treating all the sections of the Act from 33 to 42, both inclusive, as dealing only with what the learned judge calls "construction contracts," leaving all other contracts, as, for instance, lighting contracts, outside their provisions, with the remarkable result that, notwithstanding the provisions of s. 42, there is nothing to prevent any Commissioner, alderman, or common councillor from having the largest interest in any contract with the Commissioners other than a construction contract. In contradiction of this construction, I hold that the sections above mentioned do, in one part or another, deal with every possible contract that the Commissioners can enter into by virtue of the Act, and that the proviso contained in s. 42, whatever its effect, is to be applied to every such contract; and I proceed to refer to the different sections of the Act, so far as it seems to me necessary for establishing that proposition.

Sect. 33 authorizes the Commissioners or any committee appointed by them (no authority to any such committee is conferred elsewhere in the Act) to contract for the matters hereinafter mentioned: (*a*) The execution of any works directed or authorized by the Act to be done by the Commissioners. This would plainly authorize a contract for constructing sewers, though the power to deal with sewers is not, except by general terms, given or referred to by ss. 33 to 42 inclusive, or previously to s. 33. (*b*) The furnishing of materials. This would clearly authorize a contract with quarry-owners in Wales, for instance, to furnish hundreds of tons of granite sets to be delivered at any appointed place in the City. Such a contract could by no ingenuity be described as a construction contract. (*c*) The furnishing of labour. This might extend to the laying down of the granite sets so as aforesaid purchased, or other dealings with materials supplied, or to some totally independent purpose unconnected with the supply of materials—e.g., the watering or sweeping of the streets. Some of these contracts might possibly, others could not

properly, be described as "construction contracts." (*d*) Any other matters or things whatsoever necessary for enabling them to carry the purposes of the Act into full and complete effect. I can hardly imagine words better calculated to exclude any ejusdem generis construction than these last, even if it were possible to indicate any one genus to which all the contracts coming under heads (*a*), (*b*), and (*c*) could be referred, which I do not think it is. Obviously a lighting contract would be within these general words, and I do not know any contract for purposes of the Act which could be excluded. If the precedent words of the section were to be treated as cutting down the generality of the subsequent words, it would only be by a construction which would render both the execution of works and the supply of materials or labour essential to every contract. For this there can be no reason, and such a construction cannot be accepted.

After this examination of the words of s. 33, it appears hardly necessary to go further; but I may observe that it is only to contracts falling within s. 33 that the provisions of s. 34, as to contracts being signed by seven or more Commissioners or their clerk, will apply, though obviously they are to apply to all contracts entered into by the Commissioners: that s. 36, as to advertisements of contracts to the amount of 200*l.*, applies in terms to all contracts. Sect. 41 applies in terms to all contracts authorized to be made by or on behalf of the Commissioners for any of the purposes of the Act, and certainly is not confined to construction contracts.

These instances, without inquiring whether there may not be others, make it plain that the sections preceding s. 42 apply to all manner of contracts authorized by the Act, and s. 42, whether treated as a proviso on s. 41 or on the previous sections generally, must do so.

It does not require argument to prove that all contracts dealt with in s. 33 are also referred to and dealt with in s. 42; and it is almost impossible to suppose such one-sided legislation as would apply the stringent provisions of that section to construction contracts only and leave it lawful to any Commissioner, alderman, or common councillor to have the largest

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interest in any contract with the Commissioners that is not a construction contract.

As to the meaning of s. 42, the important point for decision is whether a corporator or shareholder of an incorporated company is or is not interested directly or indirectly in any contract entered into with the corporation or company. It was admitted on behalf of the plaintiff company that as a general rule he is so interested; and indeed to deny that would be equivalent to saying that in case of a contract with an incorporated company no person whatsoever is interested though the whole fortunes of the corporators or shareholders may depend upon the contract—a contention which is manifestly absurd. But, beyond what I think may fairly be called the main contention—namely, that only construction contracts are within s. 42—the plaintiffs have contended, and the learned judge has in their favour held, that the Act of 1851, and particularly s. 53 thereof, proves that, under the special legislation affecting the Commissioners of Sewers, a shareholder is not considered as being interested in a contract made by his company, though he must necessarily share in any profits or loss that might be the result thereof. If there were words in the Act of 1851 necessarily involving that conclusion, effect must be given to them, but no mere conjecture based on probable grounds would be sufficient for the purpose.

The argument of the plaintiffs, adopted by the learned judge, turns entirely upon s. 53 of the Act. That is a section not relating to concluded contracts, but to discussion and votes antecedent to contracts. It refers only to Commissioners, and not to aldermen or common councillors, though they are dealt with by s. 42 of the Act of 1848. The section was obviously intended to extend still further the disabilities of Commissioners, and there is nothing to indicate that any relaxation of the provisions of the earlier statute was intended. But, whilst providing that no Commissioner being a surveyor, solicitor, or agent of a company with whom it is intended to enter into a contract shall sit or vote, it applies naturally the same provision to a shareholder of the company. It would be strange, indeed, if a surveyor, solicitor, or agent were prevented

from sitting or voting and a shareholder permitted to do both. But from the fact that a Commissioner shareholder is prohibited by s. 53 from sitting or voting upon the question of entering into a contract with his company, it has been argued that he could not be possessed of such an interest as under s. 42 of the Act of 1848 would render the contract, if and when made, null and void. It would be unnecessary, it is argued, to prevent him from sitting and voting if the fact of his holding shares would of itself avoid the contract. The argument loses sight of the fact that a shareholder Commissioner might, by taking part in and voting as to the expediency and policy of a contract with his company, exercise perhaps a decisive influence on the entering into such contract, and yet might not, when the contract was signed, be any longer a shareholder or any longer a Commissioner, in either of which cases the contract would be unaffected by s. 42. There is, in fact, no necessary connection between s. 42 of the earlier and s. 53 of the later Act, and it would be illogical and merely conjectural to assume that the later section should interpret the earlier.

The conclusion I arrive at is that a shareholder Commissioner, alderman, or common councillor is "interested" within s. 42, and that the existence of his interest is sufficient to render a contract with his company null and void. The fact that express provision has been made by Parliament that a member of an ordinary municipal council shall not be precluded, by being interested only as a shareholder of an incorporated company, from taking part in making a contract between his company and the corporation of which he is a member, only emphasizes the distinction in this respect between ordinary municipal corporations and the City Corporation, as to which no similar parliamentary provision exists, or apparently ever has existed. Mr. Danckwerts pointed out that in legislation relating to the City Corporation clauses substantially similar in effect to s. 42 of the Act of 1848 have been regularly inserted from a time long anterior to the date of the Municipal Corporations Act, 1882, down to the present time. This disposes of the suggestion that the legislation of 1848 was a mere

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experiment, which, being found unsatisfactory, was amended in 1851.

Turning now to the facts of the present case, so far as they are relevant, we find from the statement of claim and the particulars in the defence, which are admitted to be accurate, the facts hereinafter stated. With regard to the central and western districts the Brush Company obtained provisional orders, with the consent of the Commissioners of Sewers as local authority, and those orders were confirmed by an Act of Parliament not containing any statutory power of assigning the contracts which might be made with the Commissioners. The Brush Company entered into contracts with the Commissioners of Sewers, dated, as to the central district, May 19, 1890, and, as to the western district, February 5, 1891, as to electric light. At each of those dates a common councillor was a shareholder in the Brush Company, and each of the two contracts is null and void ab initio. Notwithstanding this, by a deed dated August 21, 1891, the Brush Company affected to convey the contracts to the plaintiff company, but this assignment could not render valid the contracts which were already null and void. We have only to give effect to the provisions of the statutes, and have not a dispensing power, even if we were disposed to exercise it.

With regard to the contract as to the eastern district, dated May 28, 1890, it appears that the Laing, Wharton, and Down Construction Syndicate, Limited, the contracting parties, had no shareholder whose existence would render the contract null. On the assumption, which I see no reason to doubt, that that contract was originally entered into in good faith, I can find no provision in the Acts of 1848 and 1851, or either of them, entitling us to set it aside.

VAUGHAN WILLIAMS L.J. expressed his concurrence with the judgment of Rigby L.J.

STIRLING L.J. The question in this case turns on the true construction of s. 42 of the City of London Sewers Act, 1848. Farwell J. has decided in favour of the plaintiffs on two

grounds: first, that the contracts referred to in that section do not include contracts for the lighting of the City with electric light entered into pursuant to s. 116 of the Act; and, secondly, that, upon the true construction of s. 42 when read in connection with s. 53 of the City of London Sewers Act of 1851, the shareholder of a company with which the Commissioners of Sewers have made a contract is not a person "directly or indirectly interested or concerned in" the contract within the meaning of s. 42. These two points call for separate examination.

The contracts specified in s. 42 are those "which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever." With reference to similar words contained in s. 33 of the Act, the learned judge observes: "It is said by the defendants that those words are perfectly general, with nothing to restrict their generality; but if this be so, the three preceding lines of s. 33, 'for the execution,' &c., are superfluous. It is idle to specify two particular sets of contracts if you follow them up with the words 'all contracts.'" This observation has some force, but does not carry the case very far, for I apprehend that, as a rule, general words are to be read in their natural meaning unless, on a consideration of the whole instrument, the Court is satisfied that they are used in a more limited sense. The learned judge accordingly refers to other parts of the Act for the purpose of shewing that some restriction ought to be placed on these general words; and, in the first place, he relies on ss. 33–42, which he describes as "a fasciculus of clauses" relating to what he terms "construction contracts" only, meaning thereby contracts for the construction of works or supply of materials to the Commissioners which will become their own property, and not including such contracts as those for the supply of water, or gas, or other illuminants for lighting the City by companies or persons owning waterworks or gasworks, or the like. I am unable to agree with this view of the learned judge. I had intended and had prepared to examine these sections in some detail, but they

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Stirling L.J.

have already been criticised by Rigby L.J., whose judgment I have had the opportunity of reading. I agree with his observations and forbear repeating in different language what in substance he has already said.

Farwell J. further places reliance on the language of several subsequent sections in which fresh powers of contracting are conferred on the Commissioners: as for example, s. 55 for the supply of water, s. 116 for lighting, and s. 143 for restoring pavements; and he observes that if the defendants were right in their contention that every form of contracting within the powers of the Commissioners was authorized by s. 33, it would have been needless to create by s. 116 a further power to enter into contracts with gas companies and other persons for lighting the City. This observation is certainly entitled to weight, but there are other considerations to which regard must be had.

In the first place, s. 116 has the effect of delegating to gas companies and other persons a portion of the duties imposed on the Commissioners by s. 5 of the Act; and in the absence of such a clause as s. 116 questions might well be raised whether such contracts as are thereby sanctioned were within the powers of the Commissioners. Further, if, as is concluded by the learned judge, s. 116 is not within s. 42, it would be lawful for the Commissioners to contract with any *person* whomsoever, and consequently any Commissioner, for the lighting of the City, a result which cannot, I think, have been contemplated by the framers of the Act.

On the whole, I am unable to find anything in the Act which satisfies me that a limitation ought to be placed on the general words found in ss. 33 and 42; and, in my opinion, the latter section ought to be held to apply to contracts made under s. 116.

On the second point, namely, the effect of s. 53 of the Act of 1851 on the construction of s. 42 of the Act of 1848, I again find myself in agreement with Rigby L.J., and for the same reasons. It was admitted that primâ facie a shareholder in a company which contracts with the Commissioners is indirectly interested in the contract; and, in my opinion, s. 53 of the Act of 1851 does not shew that s. 42 of the Act of 1848 ought to be read

otherwise. It was also admitted that the words "null and void" in s. 42 are to be read in their natural sense and do not mean "voidable" merely.

Now, at the time when two out of the three contracts which the plaintiffs assert to be valid, namely, those entered into with the Brush Company, it appears that a common councillor and Commissioner of Sewers, a common councillor not a Commissioner, and the Lord Mayor for the time being (an alderman and ex-officio Commissioner) were shareholders in the company. It follows that these two contracts were void ab initio: nothing has subsequently happened to give them validity, and the action fails as to them.

With reference to the third contract, namely, that with the Laing, Wharton, and Down Construction Syndicate, a further question arises. At the time when that contract was entered into, no Commissioner, alderman, or common councillor was a shareholder in the syndicate: consequently the contract was not invalid under the section in its inception. Subsequently, by deed dated August 21, 1891, the benefit of that contract was assigned to the plaintiff company. At that date several Commissioners, aldermen, and common councillors were shareholders in the plaintiff company.

It is contended that that contract, though originally valid, became null and void as from August 21, 1891. Now s. 42 is one of a highly penal character, and ought to be strictly, though fairly, construed. It appears to me that s. 42 is limited to invalidating contracts in which a Commissioner, alderman, or common councillor is directly or indirectly interested or concerned at the time the contract is made or entered into, and does not extend to avoiding a contract good in its inception by reason of such a person subsequently becoming, for example, by purchase or otherwise, the owner of a single share in the contracting company. To hold otherwise might, as it seems to me, be productive of great injustice; and, in my judgment, such a construction ought not to be adopted in the absence of clear words.

It was, however, contended that a direct contract between the plaintiff company and the Commissioners of Sewers had

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been entered into by way of novation, and that this new contract was invalid under s. 42. It becomes necessary to see exactly what has taken place in this respect. [His Lordship then stated the facts relating to the syndicate agreement of May 28, 1890, and the assignment by the syndicate to the plaintiff company of the Eastern Order and the benefit of that agreement, and continued :—]

I am unable to see that the syndicate has ever been discharged by the Commissioners from liability under the original contract. The resolution of the Commissioners of June 23, 1891, expressly provided that the rights of the Commissioners under the contract should remain intact: the resolution of September 22, 1891, did not mention any of the contracts: and I think that what has been done has not impaired the validity of the original contract with the syndicate.

The result of the appeal will therefore be as follows: Reverse the judgment of the Court below so far as it relates to the agreements dated May 19, 1890, and February 5, 1891: Discharge so much of the order as relates to such agreements, and in lieu thereof declare that the said agreements were and are null and void, and that the defendants are not bound thereby. No costs ought to be given here or below.

Solicitors: *The City Solicitor; Ashurst, Morris, Crisp & Co.*

G. I. F. C.

C. A.
1901
Jan. 28;
Feb. 22.

In re MASON.
OGDEN *v.* MASON.

[1898 M. 2223.]

Will—Residuary Devise—Specific Devise—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 25.

A devise of the residue of, or the remainder of the freeholds, or of all other the freeholds of a testator is a good "residuary devise" within the meaning of s. 25 of the Wills Act, 1837, though it does not extend to copyholds.

There may be in the same will two good residuary devises, the one limited to freeholds, the other limited to copyholds.

A testator, who possessed several freehold houses at Wimbledon and two freehold houses at Kingston-on-Thames, devised one of the houses at Wimbledon to his son in fee. And he devised "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere" to other persons. The devise to the son became void because he attested the will:—

Held, that the second devise was a good residuary devise within s. 25, and that it included the house the devise of which to the son had failed.

Decision of Kekewich J., [1900] 2 Ch. 196, reversed.

In re Brown's Trusts, (1855) 1 K. & J. 522, and *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, explained and distinguished.

Appeal against the decision of Kekewich J. (1)

F. W. T. Mason by his will, dated January 27, 1862, devised his freehold house and shop where he carried on his business at Wimbledon to his son T. F. Mason in fee. And "as to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere, and all my leasehold estates whatsoever and wheresoever," the testator devised and bequeathed the same to his wife for her life, and after her death to trustees, upon specified trusts. At the date of the testator's death in 1865 his freehold estate consisted of a cottage, two shops, and a beerhouse, all in Wimbledon, and two houses in Kingston-on-Thames. He had no copyholds. The devise of the house and shop to his son failed because the son had attested the will. The testator's widow died in 1882. The question was afterwards raised whether the house and shop devised to the

(1) [1900] 2 Ch. 196.

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son passed under the devise of "all other" the testator's freeholds or whether it was undisposed of. Kekewich J. held on the authority of *Springett* v. *Jenings* (1) and *In re Brown's Trusts* (2), and contrary to his own first impression, that that devise was not a "residuary devise" within the meaning of s. 25 of the Wills Act, because it was not universal and did not include copyholds. He thought that a restriction as regards tenure must have the same effect as a restriction as regards locality. Consequently, the house and shop devised to the son did not pass under the second devise, but went to the testator's heir-at-law. The cestuis que trust under the second devise appealed.

Renshaw, K.C., and *Sargant*, for the plaintiffs. Kekewich J. held that the devise in question was not a good residuary devise within the meaning of s. 25 of the Wills Act (3) because it was limited to freeholds and did not include copyholds.

A gift of "all other" a testator's freehold estate is equivalent to a gift of "the residue" or "the remainder" of his freehold estate: *Cogswell* v. *Armstrong* (4); *Bernard* v. *Minshull* (5); *Blight* v. *Hartnoll*. (6)

It is submitted that the devise now in question is a true residuary devise. Before the Wills Act there could be a residuary devise of freeholds only: vide Powell on Devises, 3rd ed. vol. i. p. 736. At that time copyholds could not be devised unless they had been surrendered to the uses of the will. Sect. 3 of the Wills Act provides that copyholds may be devised without a surrender to the uses of the will. There

(1) L. R. 6 Ch. 333.

(2) 1 K. & J. 522.

(3) Sect. 24: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Sect. 25: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

(4) (1855) 2 K. & J. 227.

(5) (1859) Joh. 276.

(6) (1883) 23 Ch. D. 218.

may well be two residuary devises, the one of freeholds, the other of copyholds. If a testator devised all his freehold estate in the county of A. to one person, and all the rest of his freehold estate in England to another, and the first devise failed, the freehold estate in A. would be included in the other devise. It is not necessary to constitute a residuary devise that it should include all the testator's real estate of whatever tenure. There may be a residuary devise of a particular class of property, if it is described by a legal quality of that class, especially when, as here, the quality consists in the mode of descent. A residuary devise is treated as shewing the intention of the testator to substitute the residuary devisee for the heir-at-law, and in the present case the intention was to pass all that would otherwise have vested in the heir-at-law. Copyholds do not pass to the heir-at-law as such, though he may in fact be also the customary heir. *Springett* v. *Jenings* (1), on which the learned judge relied, is distinguishable. There the restriction was by locality—not, as in the present case, by tenure. The devise was of "the rest of my freehold hereditaments situate in the parish of Hawkhurst," and it was held that there were two specific devises, and that, when one of them had failed, the other did not sweep in the property included in the first. Moreover, the insertion of the word "elsewhere" in the present will distinguishes the case from *Springett* v. *Jenings*. (1) That case does not decide that there cannot possibly be two residuary devises. It is the practice of conveyancers now in drawing wills to make separate devises of freeholds and copyholds and to add a residuary devise of each class. In such a case, if the learned judge is right, there would be no residuary devise. Sect. 15 of the Wills Act makes a gift to an attesting witness "utterly null and void"—that is, the effect is the same as if the gift had not been inserted in the will, and in that case the property would have passed under the residuary devise. In *De Trafford* v. *Tempest* (2) a particular residue was created of chattels in a mansion-house "not hereinbefore otherwise disposed of," and it was held that some chattels in that house, the gift of which had failed, were included in that

(1) L. R. 6 Ch. 333.
(2) (1856) 21 Beav. 564.

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residue. This decision was approved by Mellish L.J. in *Springett* v. *Jenings*. (1) So here "all other my freehold messuages" means "all that I have not effectually disposed of." The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift: *Champney* v. *Davy*. (2)

The cases upon powers of appointment throw some light on that point: see Farwell on Powers, 2nd ed. pp. 246 and seq.; *In re Bagot*. (3) A difference in locality does not affect the legal quality of the property. In *Springett* v. *Jenings* (1) the property was not described by any particular legal quality, and the gift was as much specific as if the property had been enumerated by items. In *Lancefield* v. *Iggulden* (4) it might (if the respondent is right) have been said that there was no residuary devise, because copyholds were not mentioned, but the point was not suggested. In *Cook* v. *Oakley* (5) a gift of "all things not before bequeathed" was restricted to things ejusdem generis as those before mentioned; but still it was held to be a particular residuary gift. The reasoning of Wood V.-C. in *In re Brown's Trusts* (6) is in favour of the appellants.

Warrington, K.C., and *George Henderson*, for T. G. Mason, the devisee of the testator's heir-at-law. The main question is what is the meaning of "residuary devise" in s. 25. The principle of the decision in *Springett* v. *Jenings* (1) is to be found in the judgment of Mellish L.J., where he said (7) "the Legislature intended the section to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands." The devise must be so expressed as to apply to all lands not otherwise disposed of. A devise restricted to freeholds is not a residuary devise. In *Springett* v. *Jenings* (1) the devise of the rest of the testator's freehold hereditaments in Hawkhurst was not residuary; the testator might have acquired other

(1) L. R. 6 Ch. 333.
(2) (1879) 11 Ch. D. 949.
(3) [1893] 3 Ch. 348.
(4) (1874) L. R. 10 Ch. 136.
(5) (1715) 1 P. Wms. 302.
(6) 1 K. & J. 522.
(7) L. R. 6 Ch. 338.

freeholds not in Hawkhurst. That applies to the present case. If a man gave all the residue of his freehold estate, and afterwards gave all the residue of his real estate, the second gift would be the real residuary gift within s. 25. For the purposes of that section the residuary devise must be one which disposes of the whole of the genus "real estate." In *In re Brown's Trusts* (1) the reason why the devise was held to be not residuary was that it only disposed of property over which the testatrix had a particular power of appointment. Without the aid of s. 25 the gift of "all other my freeholds" would not include the house the devise of which was void. In *Springett* v. *Jenings* (2) the words of the devise were in themselves sufficient to include the property the devise of which was void.

[STIRLING L.J. referred to *Robertson* v. *Broadbent*. (3)]

In that case there was a general bequest of personal estate, with the exception of money or securities for money, and it was held that that bequest was not specific, and was not exempt from the payment of the testator's pecuniary legacies. The argument for the respondent would have been the same if the devise had been of "all other my freeholds" without any reference to Wimbledon. It is submitted that s. 25 contemplates only one residuary devise—it says, "the residuary devise (if any)." *In re Brown's Trusts* (1) and *Springett* v. *Jenings* (2) are in accordance with that view. A "residuary devise" must be one which would prevent the testator from dying intestate whatever real property of whatever nature he might acquire after the date of his will. If, independently of s. 25, the words "all other," &c., would include a lapsed devise, the provision of s. 25 would have been unnecessary. The object of that section was that a certain effect should follow, whatever might be the construction of the words of the devise. A "residuary devise" within s. 25 is a devise which is not specific. A specific devise is one which is restricted by some quality of the property comprised in it—e.g., by locality, or by tenure, as in the present case. The second devise in the present case is specific, and it falls within *Springett* v. *Jenings*. (2)

(1) 1 K. & J. 522. (2) L. R. 6 Ch. 333.
(3) (1883) 8 App. Cas. 812.

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If there could be two residuary devises, one of freeholds, the other of copyholds, under which of them would a void devise fall by reason of s. 25?

Sargant, in reply. In *Springett* v. *Jenings* (1) there were two restrictions in the devise—locality and tenure. The Court did not deal with the restriction of tenure. If the property is described by an inherent legal quality, such as tenure, the devise is residuary; if it is described by an accidental quality, such as locality, the devise is specific.

Cur. adv. vult.

Feb. 22. RIGBY L.J. The question is whether there was an intestacy as regards the real estate specifically devised by the testator in the first place to T. F. Mason, or whether that estate was taken up by a devise which is alleged to be residuary, and is contained in the gift of "all other my freehold messuages and tenements at Wimbledon and elsewhere" to trustees.

Before discussing the particular terms of the Wills Act in connection with the devise contained in this will, I think it will be convenient to make some general observations upon the state of the law at the time when the Wills Act was passed. I do not, of course, intend to make an exhaustive statement; I will only refer to such well-known facts in relation to the then existing law as appear to me to throw light upon and to aid in arriving at the construction of the will. In the first place, there were some great differences between personal estate and real estate. With regard to a testator's personal estate his will spoke as from his death, but it had no such operation with regard to his real estate. The result as to real estate was that the only thing the testator could do, however he expressed himself, was to give that real estate which he had when he made his will; although he might use general words, he was really doing nothing more than or different from what he would have done if he had enumerated the particulars of the real estate which he possessed, and the gift was necessarily specific. Again, with regard to personal estate, a construction undoubtedly obtained the peculiarity of which does not strike us because

(1) L. R. 6 Ch. 333.

it has long been so familiar to us all. If a testator gave to A. (I will take a simple instance) "10,000*l.* Consols now standing in my name," indicating with precision and accuracy the Consols which were possessed by him, and then went on to say, "and all the residue of my personal estate" to B., the word "residue" was not construed according to its obvious meaning as referring to all other personal estate except the 10,000*l.* Consols. For if the gift of the 10,000*l.* Consols failed the Consols fell by virtue of the word "residue" into the gift of residue. Nothing could prevent the word "residue" really meaning everything except the Consols, nevertheless it was held to include the Consols themselves and to prevent their being undisposed of. And it was not by virtue of any special merit in the word "residue" that that result took place. Other words of the same purport and effect would have the same result. The word "rest," for instance, or the word "remainder," and also the word "other." So that if a testator gave the 10,000*l.* Consols to one person, and all other his personal property to a different person, and the gift of the Consols failed, the word "other," like the word "residue," was held to have the effect of attracting to itself and disposing of by virtue of the gift the Consols, although they appeared to have been kept by themselves. Of real estate there could be, as the law then stood, no residue in the sense in which that word is applied to personalty. Every gift of real estate at that time must have been a specific gift. But it was not in every case in which the word "residue" was used in regard to personalty that it had the effect of what I may call a genuine residuary gift—the effect of drawing to itself and including the subject-matter of other gifts which failed. A familiar instance of that is to be found in cases in which the word "residue" was applied to personal property which was, so to say, separated from the rest by a barrier created by a description, or by the fact that it was subject to a power of appointment which the testator could exercise by his will. In both those cases the mere use of the word "residue," or of an analogous word such as "rest," or "remainder," or "other," or the use of them all together, did not constitute what I call a true residue. For instance, if a power was given by A. to appoint by

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will certain defined personal estate, and the donee appointed a particular part of the property to one person, and went on to say "and all the residue I appoint" to another person, that did not constitute a true residuary gift in the sense that it would of necessity and from the very force of the word "residue" attract to itself and dispose of the whole property, in case the gift of the specific part of it had failed owing to the death of the intended appointee during the testator's lifetime or on any ground which made the gift null and void. The gift of the residue simpliciter did not create a true residue, but the gift of that which remained of the fund was as specific as the gift of the first described portion. It was no doubt within the power of a testator to express himself in such language as to shew that his intention was that the gift of what he called residue should comprise the specifically appointed part of the fund, if the gift of it failed for any reason, and there are numerous cases in which that took place. But words had to be pointed out which proved that intention; whereas in the case of a true residue no such words were necessary: the word "residue" of itself produced the result. There are many cases of this kind not necessarily confined to powers of appointment, but extending to a testator's own property. For instance, in *De Trafford* v. *Tempest* (1) a testator gave to his wife certain chattels "which at the time of his decease might be at or in or about his capital mansion," and then bequeathed to his son all his household and other furniture, plate, and chattels "not hereinbefore otherwise disposed of" which at the time of his decease might be at, in, or about his capital mansion. He did not say "not hereinbefore mentioned," but "not hereinbefore disposed of," which must of course mean, and has always been taken to mean in a similar context, "not hereinbefore effectually disposed of," making his intention clear that, if the gift to his wife should fail, those chattels which he had attempted to give to her were to be included in the gift to his son. Such cases were numerous, and the principle applied also to a limited fund—a fund subject to a power of appointment, or in some other way limited and as it were taken out of the general

(1) 21 Beav. 564.

personalty. The testator could if he chose use such language as would make it plain that the residue was to include the subject of gifts which failed. But if the fund which was being dealt with was in its nature cut off and separated from all the other personal estate, a gift of the residue of it would not be a residuary gift—it would be a specific gift. For instance, if there were a gift of certain stocks, and then a gift of all the residue of the "stocks which I shall be entitled to at the time of my death," that would not be a residuary gift, but was held to be a specific gift. As I have already said, no such questions could arise with regard to real estate before the Wills Act of 1837, because a residuary gift of real estate, in the proper sense of the word, could not be created. Copyholds stood before the Wills Act in a very different position from freeholds. By the Act 55 Geo. 3, c. 192, a serious attempt was made to improve the law as to wills of copyholds. Before that Act there could be no gift of copyhold by will, unless the tenant had gone through the process of surrendering his interest to the lord, to be held upon the uses to be declared by his will. The Act of 55 Geo. 3 provided that the tenant might dispose of his copyholds by will without any previous surrender, due provision being made for preserving the interest of the lord and the steward, so that the lord should receive all such fines and the steward should receive all such fees as they would respectively have been entitled to, if the regular course of surrendering to the uses of the will had been adopted. The Wills Act of 1837 repealed by implication, or at any rate superseded, the Act of George III. with the view of making more effectual provisions. Probably under the Act of George III. a devise of copyholds operated only (as it had done before) as an appointment, authorising the appointee, on payment of the proper fines and fees, to get himself admitted by the lord. By the Wills Act of 1837 a devise of copyholds without a previous surrender is permitted, but careful provision is made for securing to the lord and to the steward all those rights to which they would respectively have been entitled if the older course had been pursued. Still a devise of copyholds by will is even now totally different in its effect from a devise of freeholds. Whether it

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does or does not operate strictly as an appointment, it operates quite differently; it does not give the legal estate to the devisee, but only the right to call for it, and it does not give that right absolutely, but only subject to the payment of what may be important sums of money, namely, fines and fees.

Now I come to the question with which we are immediately concerned, that is the construction of s. 25 of the Act of 1837. Sect. 24 removed one distinction between real and personal estate in that it makes the will speak and take effect as regards both real and personal estate as if it had been executed immediately before the death of the testator, and thereby gets rid of the difficulty, which had been found insuperable down to that time, in the way of a testator disposing of real estate acquired by him after the date of his will. [His Lordship read s. 25, and continued:—]

The words are "the residuary devise (if any)." That is the question we have now to determine. Is there in this will a residuary devise in which the specific freehold property which was given to the testator's son (the gift of which was rendered null and void by reason of his having been a witness to the will) is included? I have the satisfaction of knowing that Kekewich J., if he had felt at liberty to follow his own view, would in all probability have arrived at the same conclusion as I do, namely, that there is a sufficient residuary devise to take up the subject of the null and void specific devise. The learned judge felt himself bound by one or other of two cases: *In re Brown's Trusts* (1), a decision of Page Wood V.-C., and *Springett* v. *Jenings* (2), a decision of James and Mellish L.JJ. As regards *Springett* v. *Jenings* (2), if I came to the conclusion that it had in principle decided the present case, I should, of course, follow it. But in my view neither of those cases when properly considered has any bearing on such a case as the present. *In re Brown's Trusts* (1) dealt with real estate which was, under a marriage settlement, subject to a power of appointment by will by the wife, who exercised it by her will. She appointed a part easily recognisable and specifically described to her husband in fee, and "all other the hereditaments com-

(1) 1 K. & J. 522. (2) L. R. 6 Ch. 333.

prised in" the settlement "not hereinbefore disposed of" to other persons. Afterwards she revoked the appointment to her husband, and appointed that specific part of the estate to him for life, with remainder on trust for some charities. The gift to the charities being void, the question was whether that specific part of the estate passed under the other gift which in its words looked like a residuary gift. Page Wood V.-C. held that it did not, because, from the nature of the case, there being a specific property, a taking out of it of a specific portion and then a dealing with the residue, the two gifts constituted only two specific gifts, and upon the failure of the one the part comprised in it did not fall into the other, but was undisposed of. In *Springett* v. *Jenings* (1) there was a gift to one person of a specific part of the testatrix's freehold property in the parish of Hawkhurst, and then a gift of the rest of her freehold hereditaments in that parish to another person. The question was whether, on the failure of the first gift by reason of its having been made on a secret trust for a charity, the specific portion intended for charitable purposes passed under the second gift of the rest of the freeholds in Hawkhurst. James L.J., in deciding that it did not, went strictly upon the lines of *In re Brown's Trusts* (2), and held that the second gift was not a residuary gift or in the nature of a residuary gift, but was specific, and being specific it could not take up the property comprised in the other specific gift which had failed. He made that so clear that I do not think it necessary to dwell upon what he said, and that was the decision at which the Court arrived. If the present case were substantially the same as *Springett* v. *Jenings* (1) we should certainly be bound to follow that decision. Mellish L.J., however, while professing to agree with James L.J., made some observations upon s. 25 of the Wills Act. Those observations were absolutely unnecessary for the decision of that case, and if they in any way differed in principle from my own conclusion I should be obliged to say that they were obiter dicta. But I need not do that, for I think that, upon a fair interpretation of what Mellish L.J. said, he must be considered as intending to confine his observations to cases

(1) L. R. 6 Ch. 333. (2) 1 K. & J. 522.

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of the same nature as that which was then before him, and not to extend them to cases of an entirely different character. He said that s. 25 appeared to him "to assume that there can be only one residuary devise in the will," and, no doubt, in a very substantial sense that must be so. He was dealing with specific gifts, and he held that you cannot make a residuary gift out of a number of specific gifts, although those specific gifts may in fact together amount to a devise of everything which the testator had. Mellish L.J. said he thought that s. 25 was intended "to apply only where there was what may be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands." There must be some quality of universality about it. Now, that is just what, as I have already pointed out, was requisite to constitute a residuary gift of personalty. If the gift was in its nature confined to a particular class of personalty it could not be residuary, because a residuary gift must have generality. That, as I apprehend, is what was meant by the use of the word "universal" in the judgment of Mellish L.J. I do not think he meant that which has been attributed to him, but, if he did, I think he was going outside the case before him, and, without perhaps sufficient argument, stating his view of s. 25 in a way which does not bind this Court.

Now let me turn to s. 25. I am clearly of opinion, and for the purpose of this judgment I hold, that a gift in these terms, "All the residue of my real estate I give, as to freeholds to A. and as to copyholds to B.," would be a perfect residuary gift within the meaning of s. 25. If that be so, the Act not attempting to deal with the particular language in which any testator or draftsman may choose to express himself, it would seem to follow that such a devise as this, "I give the residue of my freehold estates to A., and I give the residue of my copyhold estates to B.," though it consists of two sentences instead of one, would constitute a valid residuary devise of all the testator's lands. Certainly I think it would do so if the testator took the trouble to explain his meaning somewhat in this way: "I make the following disposition of my real estate, viz., all my residuary freeholds to A., all my residuary copyholds to

B." It cannot be supposed that the Legislature intended to be so fantastic as to require that the residuary devise of which they were speaking should be expressed in one particular form and in no other. If they had meant that they would have said so in plain language. If, then, a testator can make a residuary gift of freeholds and a residuary gift of copyholds, what sensible difference is there as to the freeholds if he omits the gift of copyholds? The two gifts cannot interfere with one another, and the one cannot assist the other in any way. The residuary gift of freeholds will operate upon the freeholds which are not otherwise dealt with by the will, and the residuary gift of copyholds will operate upon the copyholds which are not otherwise dealt with. I hold, therefore, that the second devise in this will is a good residuary devise although it is confined to freeholds. I read the words "the residuary devise (if any)" in s. 25 as meaning any residuary devise which may be applicable to the facts of the case.

I think that the view of the law which Kekewich J. took before he thought that he was bound by *Springett* v. *Jenings* (1) to decide otherwise was right, and that he ought to have held that the trustees took, by virtue of the gift of "all other my freehold messuages and tenements," the property the gift of which to the testator's son was made null and void by reason of his attesting the will.

VAUGHAN WILLIAMS L.J. I entirely agree. I should not add anything to the exhaustive judgment of Rigby L.J. were it not that we are not only reversing the decision of the Court below, but we are laying down a rule of general application. The devise which we have to construe is of "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere," and we have to construe those words for the purposes of determining whether they constitute a residuary devise or a particular devise. The particular devise mentioned in the earlier part of this will, which has failed by reason of the devisee having attested the will, was a devise to the testator's son of a freehold house and shop at Wimbledon. Now, if these

(1) L. R. 6 Ch. 333.

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words which I have read are to be construed as merely creating a particular devise, s. 25 of the Wills Act has no application. The effect of that section, as I understand it, is this. Before the Wills Act there was a presumption in respect of residuary bequests of personalty which did not and could not apply to realty, because in the nature of things there could not be a real residuary devise of realty. Every devise of realty was specific. Then came the Wills Act, which by s. 24 altered this, because it made a will speak in respect of realty, as it had always done in respect of personalty, from the death of the testator instead of speaking from the date of his will. Then s. 25 goes on to say that the presumption which had been applied to residuary gifts of personalty should also apply to residuary devises of realty. That is, as I understand, the effect of s. 25. To use the very words of the section, "unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Whether that presumption is to take effect in the present case must depend upon whether there is a residuary devise in this will. If there is a particular and not a residuary devise, the presumption has no application ; and if so, I do not understand it to have been argued that the words of the will are in themselves sufficient to include in the particular devise, if it be a particular devise, the property in question. In *Springett* v. *Jenings* (1) there was on the facts no real difficulty. There was a devise of a portion of the testatrix's property in a particular parish, and then there was a devise of the residue of her property in that parish, and that devise of residue was necessarily held not to be a residuary devise within the meaning of s. 25. But there are some passages in the judgment of Mellish L.J. which led Kekewich J. to the conclusion that a rule had been established that no devise could be residuary within the meaning of s. 25 unless it had the quality of univer-

(1) L. R. 6 Ch. 333.

sality; that if the devise dealt with freeholds and did not mention copyholds the quality of universality was absent, and it was not a residuary devise within the meaning of s. 25. I do not understand Mellish L.J. to have laid down any such rule. But I do understand him to have laid down the rule that, if the residue is that of an entirety which exists only by virtue of the testator's definition in his will, it is necessarily a particular residue, and the devise is not residuary within the meaning of s. 25. If that is the rule and the artificial entirety consisted of the testatrix's property in the parish of Hawkhurst, the residue of that property was particular residue of the entirety thus defined only by the will. But, in my opinion, freehold property being a genus or entirety of property existing independently of the will of the testator, we may and ought to read the words of this will as constituting a residuary devise to the trustees and not a particular devise. The only doubt I have felt about the matter was as to the effect of the repetition of the words "at Wimbledon." If the words had been "and as to all other my freehold messuages and tenements at Wimbledon aforesaid I give and devise the same," there could be no doubt that it would have been a particular devise, and if anything prevents its being a particular devise it is merely the addition of the words "and elsewhere." I was not quite satisfied at first whether the Wimbledon property ought not to be treated as an artificial entirety and the gift of the other messuages at Wimbledon as a gift of a particular residue, treating the words "and elsewhere" as the words "and all my leasehold estates whatsoever and wheresoever" must necessarily be treated, namely, as dealing with a subject-matter in addition to and outside the Wimbledon property. But on further consideration I think that would be a wrong construction, and, that being so, I entirely agree with the conclusion at which Rigby L.J. has arrived.

STIRLING L.J. read the following judgment:—According to the law as it stood before the passing of the Wills Act a testator could devise only such real estate as he was entitled to at the time when he made his will. For the present purpose it is

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immaterial to inquire how this doctrine came to be established; but it is important to bear in mind some of the consequences which flow from it.

First, every devise of land, however wide its terms, whether general or residuary, was held to be in its nature specific.

Secondly, a will was ineffectual to pass real estate acquired by the testator subsequently to the date of its execution.

Thirdly, a residuary devise was ineffectual to pass real estate comprised in specific devises which failed by lapse or by their being void ab initio.

Among the cases decided in accordance with this third proposition may be mentioned *Wright* v. *Hall* (1), where the residuary devise was of "all the rest and residue of my messuages, lands, tenements, and hereditaments in Edmonton, Enfield, and elsewhere"; *Doe* v. *Underdown* (2), where the residuary devise was of "the rest, residue, and remainder of my goods, chattels, cattle, stock, ready money, plate, linen, bedding, and all other my estate whatsoever, both real and personal, not hereinbefore given and bequeathed"; and *Doe* v. *Scott* (3), where the residuary devise was of "all the rest and residue of my messuages, farms, lands and tenements, late the estate and inheritance of my late cousin, M. Addyes, or otherwise wheresoever situate."

These rules produced consequences which were considered inconvenient or unjust, and alterations were introduced into them by the Wills Act in a way which is thus described by Lord Cairns in *Lancefield* v. *Iggulden* (4): "It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments."

Accordingly s. 24 provides that, unless a contrary intention shall appear by the will, "every will shall be construed, with reference to the real and personal estate comprised in it, to

(1) (1724) Fort. 182.
(2) (1741) Willes, 293.
(3) (1814) 3 M. & S. 300.
(4) L. R. 10 Ch. 136, 140.

speak and take effect as if it had been executed immediately before the death of the testator"; and by s. 25, unless a contrary intention shall appear by the will, lapsed and void devises "shall be included in the residuary devise (if any) contained in such will." The result is, that a residuary devise is now effectual to pass real estate acquired by the testator after the making of his will, and also real estate comprised in lapsed and void devises. It has, notwithstanding, been held that a residuary devise must still be regarded as a devise specific in its nature: *Lancefield* v. *Iggulden.* (1)

The question in the present case is, whether a devise of "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere" is a residuary devise within the meaning of s. 25. Kekewich J. has held that it is not, because it "is not so worded as to apply to all land not otherwise disposed of, if the testator had or might have had between the date of his will and the date of his death any copyholds."

This, so far as I can discover, has never before been made a ground of decision. Before the statute 55 Geo. 3, c. 192, copyholds which had not been surrendered to the uses of a testator's will were held not to pass under a residuary devise of real estate (see *Doe* v. *Ludlam* (2)), and consequently could not have passed under the residuary devises which were the subject of decision in *Wright* v. *Hall* (3), *Doe* v. *Underdown* (4), and *Doe* v. *Scott* (5), already mentioned, if the respective testators had chanced to possess any copyholds when those wills were made: yet that circumstance is nowhere alluded to as being in any way a governing consideration. In *Lancefield* v. *Iggulden* (6) the devise was of "the residue of, and all the testator's estate not thereinbefore disposed of in his freehold and leasehold messuages, lands, and hereditaments," yet both in argument and in the judgments of Bacon V.-C., Lord Cairns L.C., and James L.J., this was treated as a true residuary devise. In my judgment the "residuary devise" mentioned in s. 25 of the Wills Act is one which is of a form similar to the devises dealt

(1) L. R. 10 Ch. 136.
(2) (1831) 7 Bing. 275.
(3) Fort. 182.
(4) Willes, 293.
(5) 3 M. & S. 300.
(6) L. R. 17 Eq. 556; 10 Ch. 136.

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with in the cases decided before the passing of that Act to which I have referred, irrespective of the consideration whether they were effectual to pass all real estate to which the testator was entitled at the date of the will, or might ultimately prove to be entitled. In each case the question to be answered may be stated, in language used by James L.J. in *Springett* v. *Jenings* (1), to be whether the devise is of a true general residue or of a particular residue only. Difficulties, no doubt, may arise in answering that question, but in the present case the devise appears to me to fall within the former category. I have the less hesitation in so saying, inasmuch as the learned judge tells us that in the first instance he arrived at the same conclusion, and only set it aside in deference to the authority of *In re Brown's Trusts* (2) and *Springett* v. *Jenings* (1), more particularly the latter.

Neither of those cases covers the present in point of decision, for in each of them a devise of a particular residue was dealt with. Again, in neither of them was the point which is raised in the present case in any way considered. There are, indeed, expressions in the judgment of Mellish L.J. to the effect that the devise must be a universal residuary devise—a devise of all the testator's lands; but these expressions, as it seems to me, were not necessary for the decision, and, though I am sensible of the weight which is justly due to anything which fell from that very able and learned judge, I nevertheless venture to think that, if they were really intended to apply to a case such as the present, they would unduly narrow the effect of s. 25 of the Wills Act.

Solicitors: *H. S. Bridge; H. J. Mannings.*

(1) L. R. 6 Ch. 333. (2) 1 K. & J. 522.

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In re BRUTTON & BURNEY, LIMITED.
In re BURNEY'S NEW CROSS BREWERY COMPANY, LIMITED.

C. A. 1901 Feb. 5, 8, 18.

Company—Shares paid for otherwise than in Cash—Omission to file Contract—Relief by Court—Jurisdiction—Form of Memorandum to be filed—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 33, 36.

Notwithstanding the repeal of s. 25 of the Companies Act, 1867, by s. 33 of the Companies Act, 1900, the Court has, in a case in which no contract as required by s. 25 has been filed with respect to shares issued before the repeal, power under s. 1 of the Companies Act, 1898, to give relief by ordering the filing of a contract or a memorandum in lieu of a contract, which shall operate in relation to the shares as if a contract had been duly filed before their issue.

Whether, notwithstanding s. 33 of the Act of 1900, s. 25 of the Act of 1867 has not still some operation as regards transactions to which it applied before the commencement of the Act of 1900, *quære.*

Form of memorandum ordered to be filed under s. 1 of the Companies Act, 1898.

APPEAL against the refusal by Byrne J. of an application by Burney's New Cross Brewery Company for the filing of a memorandum, under s. 1 of the Companies Act, 1898, in lieu of a contract, in relation to the issue of shares as fully paid up for a consideration other than payment in cash.

In 1898 the brewery company was incorporated for the purpose of purchasing and carrying on the business of a brewer which had been previously carried on by George Burney.

In 1899 Brutton & Burney, Limited, was incorporated. Its memorandum of association stated that the objects of the company were to purchase the business of wine and spirit merchants carried on by Messrs. Brutton & Burney at 64, Great Tower Street, City; also, "(9.) To sell the whole or any part of the undertaking, business, or property of the company for such consideration as may be thought fit, and in particular to accept payment of such consideration, either wholly or in part, in the form of a grant to the company of a ground rent

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or rents, or in shares or obligations of any other company, and to promote and form any company intended to purchase any property of the company, ... and to subscribe absolutely or subject to any condition or contingency for or acquire in any way any shares or obligations of such company.

"(10.) To subscribe for (either absolutely or subject to any condition or contingency), purchase, or acquire in any way any shares or obligations of any other company of any description."

At various dates from August to December, 1899, 646 preference shares of 10*l.* each in Brutton & Burney, Limited, were applied for by various persons on the terms stated in a prospectus which provided that the company might, if they should think fit, allot the shares thus applied for to any person or company who should have procured the applicants to be registered as holders of a similar number of fully paid-up second preference shares of 10*l.* each in the brewery company. The applicants respectively paid in cash to Brutton & Burney, Limited, 10*l.* per share upon the shares in that company thus applied for by them respectively, and they were in pursuance of the above-mentioned option respectively registered as holders of a corresponding number of fully paid 10*l.* second preference shares in the brewery company, and a corresponding number of preference shares in Brutton & Burney, Limited, was issued and allotted to the brewery company. No contract in writing with reference to this arrangement was filed with the registrar in compliance with s. 25 of the Companies Act, 1867. Some cheques were exchanged between the two companies, and apparently it was considered that in that way the shares in the brewery company had been paid for in cash, though the persons to whom those shares were allotted did not make any cash payment for them to the brewery company.

Subsequently some of the holders of the preference shares in the brewery company became apprehensive that it might be held that the real effect of the arrangement was that their shares had not been paid for in cash, and that, as no contract had been filed under s. 25, they might be called upon to pay for the shares in cash. In consequence of this doubt an application was made to the Court by the brewery company, under

s. 1 of the Companies Act, 1898, for the registration of a memorandum, as provided by sub-s. 4 of that section, to operate as if it were a sufficient contract in writing within s. 25, and had been duly filed before the issue of the shares.

Byrne J. came to the conclusion that the shares had in effect been paid for in cash, and on this ground, on April 5, 1900, he refused the application.

The brewery company did not appeal, but, with the leave of the Court, some of the preference shareholders in that company appealed.

Before the appeal came on for hearing the Companies Act, 1900, had come into operation on January 1, 1901. Sect. 33 (1) of that Act repeals s. 25 of of the Companies Act, 1867.

(1) By s. 25 of the Act of 1867, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

By s. 1 of the Companies Act, 1898, "(1.) Whenever, before or after the commencement of this Act, any shares in the capital of any company under the Companies Acts, 1862 and 1890, credited as fully or partly paid up shall have been or may be issued for a consideration other than cash, and at or before the issue of such shares no contract or no sufficient contract is filed with the Registrar of Joint Stock Companies, in compliance with s. 25 of the Companies Act, 1867, the company or any person interested in such shares or any of them may apply to the Court for relief, and the Court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it is just and equitable to grant relief, may make an order for the filing with the registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period it shall, in relation to such shares, operate as if it had been duly filed with the registrar aforesaid before the issue of such shares."

"(3.) Any such order may be made on such terms and conditions as the Court may think fit, and the Court may make such order as to costs as it deems proper, and may direct that an office copy of the order shall be filed with the registrar aforesaid, and the order shall in all respects have full effect.

"(4.) Where the Court in any such case is satisfied that the filing of the requisite contract would cause delay or inconvenience, or is impracticable, it may, in lieu thereof, direct the filing of a memorandum in writing, in a form approved by the Court, specifying the consideration for which the shares were issued, and may direct that on such memorandum being filed within a specified period it shall in relation to such shares operate as if it were a sufficient contract in writing within

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The notice of appeal asked that the order of Byrne J. might be varied, and that it might be ordered "that a memorandum in writing, in a form to be approved by the Court, and specifying the consideration for which the shares hereinafter mentioned were issued, or otherwise a sufficient contract in writing in relation to the shares numbered 17172 to 17371 of Burney's New Cross Brewery Company, Limited, issued to the applicants be filed with the Registrar of Joint Stock Companies, and that, on such memorandum or contract being filed within such period as the Court may direct, the same shall in relation to the said shares operate as if a sufficient contract in writing had in relation to the said shares been duly filed before the issue thereof."

Waggett, for the appellants. These preference shares were appropriated or allotted for a consideration other than cash. The transaction was an exchange of shares, not a "payment" at all. There was nothing equivalent to cross-payment in cash, as in *Spargo's Case* (1); in fact, no "payment" was possible under the transaction, for there can be no cross-debts under a contract to take fully paid shares: *In re Johannesburg Hotel Co.* (2) The difficulty is that s. 25 of the Act of 1867, to give relief against which was the object of s. 1, sub-ss. 1 and 4, of the Act of 1898, has been expressly repealed by the Companies Act, 1900. The repeal of s. 25 does not make shares paid up which would not otherwise be paid up. The question then is whether the Court can now give relief under s. 1 of the Act of 1898, in respect of shares issued before January 1, 1901. Sect. 7 of the Act of 1900 can have no application to the shares now in question. Apparently s. 25 is preserved, as to shares of

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the meaning of s. 25 of the Companies Act, 1867, and had been duly filed with the registrar aforesaid before the issue of such shares." . . . .

By s. 33 of the Companies Act, 1900, which Act came into operation on January 1, 1901, s. 25 is repealed, and by sub-s. 2, "No proceedings under s. 25 of the Companies Act, 1867, shall be commenced after the commencement of this Act."

By s. 36, "This Act may be cited as the Companies Act, 1900, and may be cited with the Companies Acts, 1862 to 1898."

(1) (1873) L. R. 8 Ch. 407.

(2) [1891] 1 Ch. 119, 132.

companies formed before January 1, 1901, by s. 38, sub-s. 2, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), which enacts that "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed": vide Palmer on the Companies Act, 1900, 2nd ed. p. 63. It would seem also that s. 36 of the Act of 1900 contemplates that the power of granting relief under s. 1 of the Act of 1898 will remain in force. In the present case the liability to pay in cash under s. 25 of the Act of 1867 remains, for there was no "contract" for the exchange of shares, and, therefore, of course there was no "contract filed." The Act of 1898 is intended to apply to every kind of slip, whether there is a contract or not: *In re Tom Tit Cycle Co.* (1) It is submitted that a memorandum should be filed in the form approved by Kekewich J. in *In re Whitefriars Financial Co.* (2)

Elgood, for the brewery company. It is submitted that if there was any necessity to pay for the shares in cash, it was satisfied, as Byrne J. held, by the exchange of cheques between the two companies.

Douglas, for Brutton & Burney, Limited.

Feb. 8. THE COURT (Rigby, Vaughan Williams, and Stirling L.JJ.) desired that the parties should settle a form of memorandum and submit it for the approval of the Court.

A form was accordingly prepared and copies of it were furnished to the Court.

Feb. 18. RIGBY L.J. We have seen the memorandum which has been prepared by the parties. I can see no objection to it, and it appears to me that if it is filed it will have the beneficial effect which is desired with regard to the preference shares in question.

The object of the application is to make it clear that the 646 preference shares in the brewery company which were

(1) W. N. (1899) 35 (6). (2) [1899] 1 Ch. 184.

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issued to the appellants and others were paid for. It is doubtful whether the brewery company received for those shares any other consideration than an allotment of the 646 preference shares in Brutton & Burney, Limited, which had been subscribed for and paid for in cash by the appellants and others. This transaction took place at a time when s. 25 of the Companies Act, 1867, was in force, and it was open to the objection that no contract providing for the payment of the shares otherwise than in cash was filed as required by that section. By s. 1, sub-s. 4, of the Companies Act, 1898, the Court was empowered, if satisfied that in such a case the omission to file a contract was accidental or due to inadvertence, to order the filing of a contract or a memorandum in lieu thereof, which is to operate as if it had been a contract duly filed before the issue of the shares, and I cannot see that that power has ever been taken away. There seems, indeed, to be some foundation for the suggestion that the power has been kept alive by the very terms of the Companies Act, 1900, because by s. 36 of that Act it "may be cited with the Companies Acts, 1862 to 1898," and, if the Act of 1898 had been repealed by implication, it is not probable that reference would have been made to it in that way. There can, however, be no doubt that when the Act of 1900 came into operation on January 1, 1901, s. 25 of the Act of 1867 was repealed. But still an argument, which is at any rate plausible, may be raised that, by virtue of s. 38 of the Interpretation Act, 1889, the repeal of s. 25 is not absolute, but that that section has still some operation as regards transactions to which it applied before the commencement of the Act of 1900. I will say no more than that this is a plausible argument, and I think that the appellants are not unduly pertinacious in urging that they do not know what their position will be if s. 25 is still in force, even though no proceedings can be taken against them under it. The provision that "no proceedings under s. 25 shall be commenced after the commencement of this Act" may not perhaps cover the entire case. Suppose that the brewery company were to be wound up and there were surplus assets of which the appellants desired to obtain their share, though no proceedings could be taken against them under s. 25, is it clear

that they could obtain their share of the assets in the winding-up? I think it is not an unreasonable contention (whether it be well founded or not, it is not necessary to decide now) that, in the absence of a contract filed under s. 25, they would not be able to obtain their share of the assets in the winding-up. It might be years before such a question arose, and meanwhile these shareholders would be placed in a difficult position, and the value of their shares might be seriously imperilled. Under these circumstances I think it is not unjust or inequitable that we should make an order under the Act of 1898 for the registration of a memorandum in the form which has been prepared and has been approved by us. In other respects the order will follow the terms of the notice of appeal.

In my opinion the brewery company were right in bringing the matter before the Court, but I think they ought to pay the costs in this Court and in the Court below.

VAUGHAN WILLIAMS L.J. I agree. Assuming, as I think we may assume, that the facts are correctly stated in the memorandum which has been submitted to us, I feel no difficulty in making the order which is asked for. But for this agreement of the parties I should have felt some doubt whether in fact there ever was any agreement determining that these shares should be paid for otherwise than in cash within the meaning of s. 25. But, according to the facts as they are stated in the memorandum, it appears that there was such an agreement.

STIRLING L.J. concurred.

The memorandum approved by the Court and ordered to be filed was as follows:—

"Whereas the several persons and firms, whose names, addresses, and descriptions appear respectively in columns 2, 3, and 4 of the Table annexed hereto, applied for, and (subject to the option reserved to Brutton & Burney, Limited, as hereinafter mentioned) became entitled to allotments of preference shares in Brutton & Burney, Limited, and the number of shares so applied for are set forth in column 1 of the said Table; And whereas such several persons

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and firms paid in cash to Brutton & Burney, Limited, the full sum of 10*l.* upon each of the shares so applied for by them respectively; And whereas the said several persons and firms in applying for such shares had agreed with Brutton & Burney, Limited, that Brutton & Burney, Limited, should be at liberty to issue and allot to Burney's New Cross Brewery Company, Limited, as fully paid the shares so applied for, in consideration of Burney's New Cross Brewery Company, Limited, allotting to them the said several persons and firms a like number of second preference shares of Burney's New Cross Brewery Company, Limited, to be issued as fully paid, and corresponding in number with the number of shares in Brutton & Burney, Limited, to which the said several persons and firms respectively became entitled as aforesaid; And whereas Brutton & Burney, Limited, exercised such option, and Burney's New Cross Brewery Company, Limited, agreed to give effect to the exercise thereof: Now be it remembered that accordingly, and for the considerations appearing in the premises, the second preference shares in Burney's New Cross Brewery Company, Limited, identified by the distinctive numbers set out in column 5 of the said Table, were issued and allotted as fully paid to the said several persons and firms whose names, addresses, and descriptions appear respectively in columns 2, 3, and 4 of the said Table, and the preference shares in Brutton & Burney, Limited, identified by the distinctive numbers set out in column 6 of the said Table, were allotted as fully paid to Burney's New Cross Brewery Company, Limited." Then followed the Table referred to.

Solicitors: *Van Sandau & Co.; Laytons.*

W. L. C.

EASTWOOD BROTHERS, LIMITED *v.* HONLEY URBAN DISTRICT COUNCIL.

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[1899 E. 1298.]

Local Government—Sewers—Prescriptive Right of Drainage—Trade Effluent —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

In the year 1885 a local authority connected with one of their sewers a drain which carried the effluent from the plaintiffs' manufactory, and this connection remained, and by means of it the effluent continued to flow into the sewer, until in 1899 the local authority threatened to cut off the connection:—

Held, that under s. 21 of the Public Health Act, 1875, the plaintiffs had an absolute right to discharge their effluent into the sewer, and that if that right had been qualified by s. 7 of the Rivers Pollution Prevention Act, 1876, the facilities given by the local authority to the plaintiffs for carrying their effluent into the sewer ought not to be withdrawn, unless either of the provisos to s. 7 applied, namely, unless it could be shewn that the effluent would prejudicially affect the sewers or the disposal of the sewage matter conveyed along them, or would be injurious in a sanitary point of view, or that the sewers of the local authority were only sufficient for the requirements of their district:

Held, therefore, that, none of these things having been shewn, the local authority must be restrained from cutting off the connection between the plaintiffs' drain and the sewer.

Decision of Byrne J., [1900] 1 Ch. 781, affirmed.

APPEAL against the decision of Byrne J. (1), where the facts are fully stated. The following summary will be sufficient for the present purpose.

The plaintiffs were the owners in fee of the Thirston Mills, at Honley, near Huddersfield, where they carried on the business of woollen and worsted manufacturers.

In the year 1853, when the plaintiffs' predecessors in title owned the mills, a drain was constructed from the mills, which carried the trade effluent discharged from them into a channel known as Thirston Dyke, which discharged into a drain known as the May Brook, and so into the river Holme. There was no

(1) [1900] 1 Ch. 781.

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interruption in the user of that drain for the trade effluent from the mills so long as it discharged into the Thirston Dyke.

In 1885 the Honley Local Board, the then local sanitary authority for the district, constructed a new sewerage system, which comprised a sewer near the Thirston Dyke, and the workmen of the board, without any special directions and without previous communication with the then owners of Thirston Mills, took up the drain from the mills at the point at which it met the new sewer, and connected it with the sewer; so that, from 1885 down to the commencement of this action, the drain had ceased to discharge into Thirston Dyke, and the effluent from the mills had passed through the sewer into the river Holme. There was some evidence that the volume of the trade effluent had increased in recent years, but that there had been no material change in its character.

Under the Local Government Act, 1894, the Honley Urban District Council was substituted for the Honley Local Board.

In 1897 a joint committee of the Honley Urban District Council and the South Crosland Urban District Council acquired land for the construction of outfall and purification works.

The defendants, being advised that the discharge of the trade effluent from Thirston Mills into their sewer was, on account of its temperature and for other reasons, prejudicially affecting the disposal of the sewage matter and exposing them to liabilities under the Rivers Pollution Prevention Act, 1876, had recently informed the plaintiffs of their intention to cut off the connection between the sewer and the drain from Thirston Mills.

The plaintiffs then commenced this action, claiming an injunction to restrain the defendants from disconnecting the drain in accordance with their threat.

Byrne J. granted an injunction.

The defendants appealed.

Asquith, K.C., and *E. Clayton*, for the defendants, repeated the arguments which were urged on behalf of the defendants in the Court below, contending that the "facilities" which they

were required by s. 7 (1) of the Rivers Pollution Prevention Act, 1876, to give to manufacturers for carrying off the effluents from their factories into sewers, must be regulated by the condition of the sewers and their capacity. The connection since 1885 between the plaintiffs' drain and the sewer had existed under a mere revocable licence, and the defendants, being a public body with public duties to perform, were entitled to prevent the plaintiffs from using the sewer if it was prejudicially affected by that user: *Islington Vestry* v. *Hornsey Urban Council.* (2)

They also pointed out that the decision of Charles J. in *Peebles* v. *Oswaldtwistle Urban Council* (3) had been reversed, though on another point, by the Court of Appeal (4), whose decision was affirmed by the House of Lords: *Pasmore* v. *Oswaldtwistle Urban Council.* (5)

Danckwerts, K.C., and *Waggett*, for the plaintiffs. Byrne J. found as a fact that it had not been proved that the discharge

(1) By s. 21 of the Public Health Act, 1875, "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications" . . . .

By the Rivers Pollution Prevention Act, 1876, s. 7, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

"Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any Court of competent jurisdiction respecting the sewage of such authority."

(2) [1900] 1 Ch. 695.

(3) [1897] 1 Q. B. 384.

(4) Ibid. 625.

(5) [1898] A. C. 387.

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into the sewer would, within the proviso in s. 7 of the Rivers Pollution Prevention Act, 1876, "prejudicially affect the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along" the sewer; and therefore he was right in granting the injunction. The plaintiffs' right to an injunction in such a case is absolute, and is quite independent of any difficulties the injunction may cause to the local authority: *Attorney-General* v. *Colney Hatch Lunatic Asylum.* (1) The plaintiffs have enjoyed, since 1853, the right of sending their effluent into Thirston Dyke and thence into the May Brook; so that in 1893 they had acquired an indefeasible right for forty years. Then, in 1885, they came within the special provision in the latter part of s. 4 of the Rivers Pollution Prevention Act, 1876. The defendants are bound, therefore, by s. 7 of that Act, to give the plaintiffs "facilities" for carrying off their effluent, that is, to provide all necessary means for admitting it into the sewer, including, it is submitted, the opening of a drain for that purpose. If the drain had carried only ordinary sewage from a house, it is clear that the local authority could not have cut off the connection: *Attorney-General* v. *Clerkenwell Vestry* (2); *Ogilvie* v. *Blything Union Rural Sanitary Authority.* (3) The terms of s. 21 of the Public Health Act, 1875, are general, and apply to trade effluent as well as to ordinary sewage.

By s. 68 of the Act of 1875 a penalty is expressly imposed upon any person engaged in the manufacture of gas who causes or suffers any washing or other substance produced in making gas to flow into any stream or into any drain communicating therewith. One kind of trade effluent is there dealt with, and this is an indication that s. 21 was intended to have a general operation. The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), which by s. 2 is to be construed as one with the Act of 1875, imposes by s. 17 a penalty on every person who turns or permits to enter into any sewer of a local authority, or any drain communicating therewith, any chemical refuse or

(1) (1868) L. R. 4 Ch. 146, 153. (2) [1891] 3 Ch. 527.
(3) (1891) 65 L. T. 338, 341.

waste steam, or heated water of a higher temperature than 110°, which, either alone or in combination with the sewage, causes a nuisance or is dangerous or injurious to health. These provisions would have been unnecessary if s. 21 of the Act of 1875 did not include a trade effluent. The connection of the plaintiffs' drain with the sewer was made in 1885, and at that time the Act of 1876 was in force. The first proviso to s. 7 of that Act operates at the time when the local authority admit the trade effluent into their sewers, not from time to time after they have admitted it. The plaintiffs were not committing any nuisance under s. 4 of the Act of 1876. They had a prescriptive right to carry their effluent to the spot where it entered the sewer. The local authority have caused the plaintiffs to alter their position, and if the plaintiffs had only a licence to carry their effluent into the sewer, that licence has now become irrevocable. The expression "give facilities" in s. 7 means give them once for all.

[STIRLING L.J. Suppose after the effluent has been admitted the sewers become insufficient for the requirements of the district. Under s. 15 of the Act of 1875 it is the duty of the local authority to make such sewers as may be necessary for draining their district. If the drains are not sufficient, must not the authority make them sufficient?]

If the Act of 1876 limits in any way the Act of 1875, still the plaintiffs are not affected by it. No proceedings for pollution have been taken against them. No doubt when the connection was made the local authority were satisfied that there would be no pollution caused by the plaintiffs' effluent. The defendants have an ample remedy under s. 10 of the Act of 1876 and s. 17 of the Act of 1890.

Asquith, K.C., in reply. Either s. 21 of the Act of 1875 applies only to domestic sewage, or, if it goes further, its operation has been restricted by the Act of 1876. If a local authority fifteen years ago gave facilities for carrying a trade effluent into their sewers, are they estopped from discontinuing those facilities, even though the effect of their continuing them would be to violate all the provisions of the Act for the protection of the health of the district? The duty of "giving

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facilities" implies a power to alter them from time to time. The decisions which apply to cases in which an occupier has an absolute right to connect his drains with the sewers have no application to "giving facilities." The evidence shews that the plaintiffs' effluent will prejudicially affect the disposal of the sewage of the district. Sect. 18 of the Act of 1875 does not preclude the defendants from carrying out their intention. There is nothing to shew that Thirston Dyke was a sewer. Protection is given only to a person who is lawfully entitled to the user of a sewer. The defendants have expressed their willingness to receive the domestic sewage from the plaintiffs' factory, if there be any: *Charles* v. *Finchley Local Board.* (1) The evidence shews that the defendants' sewers are not sufficient for their district.

RIGBY L.J. I have found some little difficulty in dealing with this case by reason of the rather vague way in which it has been brought forward. But it is obvious that the local authority did of their own free will some years ago allow the effluent from the plaintiffs' manufactory to be introduced into their sewer, and I can find no proof that the sewers of the district are insufficient for carrying that trade effluent, as well as all other sewage which has to be carried away by them. And, with reference to the first proviso to s. 7 of the Act of 1876, Byrne J., upon the evidence before him, has found that there is nothing to bring the case within it, and I cannot see any reason for overruling that finding. The local authority object to the plaintiffs' effluent flowing into their sewer, because they say that the land within their district suitable for the purposes of irrigation in order to dispose of the sewage is of small area, and their engineer thinks that the trade effluent is of such a nature that it will render the processes of irrigation and filtration less efficient, and will therefore be objectionable. But I cannot find that there is any objection on the ground that the effluent will cause such pollution as to render it injurious in a sanitary point of view and unfit for conveyance along the sewer. I can see no grounds for differing from the conclusion

(1) (1883) 23 Ch. D. 767.

of Byrne J., and I therefore think that the appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree.

STIRLING L.J. Whether we look at s. 21 of the Public Health Act, 1875, or at s. 7 of the Rivers Pollution Prevention Act, 1876, I think no sufficient ground has been shewn for reversing the decision of the learned judge. If s. 21 applies, then, according to the authorities, the plaintiffs have an absolute right to discharge their effluent into the sewer. If, on the other hand, their right is governed by s. 7 of the Act of 1876, it seems to me that the facilities for dealing with the effluent which have been given by the local authority ought not to be withdrawn, unless the case is brought within one or other of the provisos which follow the first part of s. 7. I agree that the defendants have not brought the case within either of those provisos, and consequently in my opinion the appeal ought to be dismissed.

Solicitors: *Jaques & Co., for Armitage, Sykes & Hinchcliffe, Huddersfield; Van Sandau & Co., for Mills & Co., Hudderfield.*

W. L. C.

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Feb. 20, 21; *March* 25.

OLIVER *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

STARKEY, LEVESON AND COOKE, THIRD PARTIES.

[1900 O. 933.]

Principal and Agent—Implied Warranty of Authority—Attorney innocently acting under Forged Power—Liability to Third Party—Transfer of Stock under Forged Power.

A firm of stockbrokers, on the instructions of a solicitor, applied to the Bank of England for forms of powers of attorney to S. and L., two of the firm, to sell Consols and bank stock standing in the names of the solicitor and the plaintiff. The forms were issued, and sent by the brokers to the solicitor, and returned by him to them. They were executed by the solicitor, and purported to be executed by the plaintiff, and to be duly attested, and the two stockholders thereby purported to appoint S. and L. jointly and severally, their attorneys and attorney, to sell and transfer the two sums of stock. The powers were taken to the bank by S. The transfer tickets were signed by S. and L., and were passed by the bank, but S. alone signed the demand to act by the powers. He was allowed to execute the transfers in the bank books of the Consols and bank stock as attorney for the two stockholders. The proceeds of the sale were paid to the solicitor. The plaintiff's signature to the powers was forged, and in an action by him the transfers were declared void as against him, and the bank were ordered to replace the two sums of stock, and to pay him the back dividends. The bank claimed indemnity against the firm of brokers and against S. and L. No blame was attributable either to the firm, or S., or the bank for what had happened:—

Held, that the transfers by S. in each case implied a warranty by him that he was authorized to transfer in the names of the stockholders, and that on that warranty, though he honestly believed he had authority, he was liable to the bank; but that the partners were not liable, no damage having accrued to the bank from the application for the powers, nor from the powers themselves, until acted upon.

Collen v. *Wright*, (1857) 8 E. & B. 647, 657, and *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, 62, followed and applied.

Polhill v. *Walter*, (1832) 3 B. & Ad. 114; 37 R. R. 344, and *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, distinguished.

IMMEDIATELY prior to December 23, 1897, a sum of 2633*l.* 12*s.* 6*d.* Consols and a sum of 147*l.* 5*s.* 4*d.* bank stock were standing in the books of the Bank of England in the names of F. W. Oliver and the plaintiff Edgar Oliver. On

December 23, 1897, W. J. Starkey, of the firm of Starkey, Leveson & Cooke, stockbrokers, executed a transfer in the bank books of the 2633*l.* 12*s.* 6*d.* Consols, acting under a power of attorney in favour of himself and E. J. Leveson, purporting to be dated December 20, 1897, and to be executed by F. W. Oliver and the plaintiff.

On March 8, 1898, Starkey executed a transfer in the bank books of the 147*l.* 5*s.* 4*d.* bank stock, acting under a power of attorney in favour of himself and Leveson, purporting to be dated March 7, 1898, and to be executed by F. W. Oliver and the plaintiff.

The plaintiff did not in fact execute either power of attorney, his signature to both powers having been forged.

F. W. Oliver died on July 7, 1899. The plaintiff then discovered that the Consols and bank stock had been transferred out of the names of F. W. Oliver and himself. He brought an action against the bank claiming a declaration that the respective transfers of Consols and bank stock were void against him by reason of his signature to the powers of attorney having been forged, and an order upon the bank to transfer into his name like sums of Consols and bank stock, and to pay to him the amount of the dividends accrued or to accrue in respect of the said sums of stock from the dates of the respective transfers until the date when the several sums of stock were respectively replaced, or to pay to him the value of the said sums of stock at the market price thereof at the dates of the respective transfers, with interest at 4 per cent. per annum in the meantime.

The bank, by leave of the Court under Rules of the Supreme Court, 1883, Order XVI., r. 48, issued a third party notice to Messrs. Starkey, Leveson & Cooke, claiming to be indemnified by the firm and by Starkey and Leveson against all liability in respect of the transfers and against the costs of the action, upon the ground that the bank were induced to allow the transfers by the representations made and warranty given by the firm in the forms of application for the powers of attorney, and by Starkey and Leveson in the powers, that they had the authority both of F. W. Oliver and of the plaintiff to make the

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applications, and to act under the powers, and by Starkey acting on the powers and transferring the two sums of stock in the bank books.

At the trial of the action the forgery was proved. It was not really contested.

Warrington, K.C., and *Pattisson*, for the plaintiff.

H. D. Greene, K.C., *Latham, K.C.*, and *Howard Wright*, for the bank.

KEKEWICH J. gave judgment for the plaintiff, and made a declaration that the transfers of the two sums of stock were void and invalid against the plaintiff by reason of his signature to the powers of attorney having been forged; and he ordered the bank to transfer into the name of the plaintiff like sums of stock, and to pay to him the back dividends, and also to pay to him his costs of the action.

The third party claim then came on for hearing.

The facts on this part of the case were as follows: On December 16, 1897, Starkey, Leveson & Cooke, acting on the instructions of F. W. Oliver, who was a solicitor, sent in to the bank an application in writing for a form of power of attorney from F. W. Oliver and the plaintiff to Starkey and Leveson, jointly and severally, for the purpose of the sale of 2633*l.* 12*s.* 6*d.* Consols. The description of the stockholders in the bank books was stated, and also their present addresses. The address of the plaintiff in the bank books was at Wimbledon, and his present address was given at 110, Cromwell Road, the private residence of F. W. Oliver. The bank, in accordance with their custom, sent to the stockholders notices of the application, asking for a reply only in the event of there being any objection. Those sent to the plaintiff were sent to both addresses. That sent to the plaintiff at Wimbledon was returned through the Dead Letter Office. That sent to 110, Cromwell Road was not returned. In due course a form of power of attorney in accordance with the application was issued to Starkey, Leveson & Cooke. They sent it to F. W. Oliver, and received it back from him. When returned, it was executed by F. W. Oliver, and purported to be

executed by the plaintiff and to be duly attested; and F. W. Oliver and the plaintiff thereby purported to appoint Starkey and Leveson their attorneys and attorney jointly and severally in their names and on their behalf, and in the name and on behalf of the survivor of them, to sell and transfer all or any part of the 2633*l.* 12*s.* 6*d.* Consols. The power was brought to the bank by Starkey on December 22, and the usual steps were taken by the bank according to their practice to test the genuineness of the signatures, but they failed to discover the forgery. A transfer ticket was put forward signed by Starkey and Leveson, and was passed by the bank clerk, and on December 23 Starkey signed the demand to act by the power, and he was allowed to transfer the Consols as attorney for the two stockholders. The proceeds of the sale were paid to F. W. Oliver by cheque, and there was no attempt at any communication between the brokers and the plaintiff.

The same course was followed with respect to the application for and the execution of the power of attorney over the 147*l.* 5*s.* 4*d.* bank stock, and the transfer under the power. Neither Starkey nor any member of his firm was acquainted with the plaintiff's signature. Evidence was given by Starkey and by other members of the London Stock Exchange (one of them being a member of the committee) that their practice was, when instructed by solicitors to transfer stock by a power of attorney, to send the power to the solicitors to get the necessary signatures, to trust to them for the execution of the power, and not to go behind them and make inquiries of their clients; and that when instructed by solicitors the account was treated as the account of the solicitors, and the money paid to them, confidence between the brokers and the solicitor clients being of the essence of the transaction. Certain officials of the bank were called to prove the course of practice of the bank as to transfers of stock under powers of attorney. They stated that the signatures to powers were compared with other signatures of the same persons in the possession of the bank in the same account; or if there were none in the same account, then with those in any account in either Consols or the India or New Zealand stocks, those being the stocks the accounts in

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which were searched for that purpose. If the examining clerk was not satisfied with a signature, he consulted his colleague upon it, and if they were not satisfied the matter was referred to the superior officials of the bank. In the present case the examining clerk called in the assistance of his colleague as to the signature of the plaintiff to the power over the bank stock, but the matter did not go further.

H. D. Greene, K.C., *Latham, K.C.*, and *Howard Wright*, for the bank. There was a warranty of authority both by the firm and by Starkey: first, by the applications for the powers; secondly, by the transfer tickets; thirdly, by the demands to act under the powers; and, fourthly, by the acts of transfer in the bank books. There were representations that the firm was instructed by both stockholders to apply for the power. They throughout represented that they were agents when they were not. It is a clear case of breach of warranty, and the bank are entitled to recover the exact amount that they have lost.

[KEKEWICH J. Supposing you are right, are the damages more than nominal except as regards the transfer?]

Possibly not; but Starkey acted as a member of the firm. It was a firm transaction throughout. The money was received by the firm and paid over by the firm, and Starkey and the firm are liable to indemnify the bank. At any rate, Starkey is liable. An agent is liable if he makes a contract as agent when he has not in fact authority to do so, although he may have acted in a bonâ fide belief that he had authority: *Randell* v. *Trimen* (1), *Collen* v. *Wright* (2), and *Firbank's Executors* v. *Humphreys*. (3) *Smout* v. *Ilbery* (4) was discussed and distinguished in *Randell* v. *Trimen*. (1)

Swinfen Eady, K.C., *P. O. Lawrence, K.C.*, and *Stewart-Smith*, for the third parties.

[KEKEWICH J. I can relieve you as regards the third parties other than Starkey. I think no case can be made against anyone but him. As far as I can see, no blame can be attributed to anyone. The bank has acted properly, and so has Starkey. It

(1) (1856) 18 C. B. 786.
(2) 8 E. & B. 647.
(3) 18 Q. B. D. 54.
(4) 10 M. & W. 1.

is a pure question of law which of two innocent parties is to suffer.]

If a person without more purports to act as agent for another without authority, but believing that he has it, he is liable: *Collen* v. *Wright*. (1) So, also, if he knows that he has no authority, but believes that it will be conferred. But if an agent believes himself to have authority, and brings it forward for the parties with whom he is dealing to verify, and they have the means of testing it, and do test it, so that they are in a position to know as much about it as the agent himself, the agent is not liable: *Polhill* v. *Walter*. (2) In that case a man was held liable because he made a representation as to authority which he knew to be untrue, and the persons to whom it was made had no means of testing it; but Lord Tenterden put this very case (3) of a man acting under a power of attorney which he believed to be genuine, but which was in fact a forgery, as a case where he would incur no liability.

[KEKEWICH J. Can that now hold good in cases falling within *Collen* v. *Wright* (1) and *Beattie* v. *Lord Ebury* (4)?]

Yes. I do not dispute those cases, nor *Firbank's Executors* v. *Humphreys* (5), nor *Halbot* v. *Lens*. (6) The old cases were reviewed in *Derry* v. *Peek*. (7) *Smout* v. *Ilbery* (8) is in accordance with what was said in *Polhill* v. *Walter*. (2) Some passages in the judgment in that case have been commented on by your Lordship in *Halbot* v. *Lens* (6), but the main decision, we submit, is good law.

[KEKEWICH J. What I was referring to there was really no more than a dictum not necessary for the decision of the case, and I thought that what was said was inconsistent with *Collen* v. *Wright* (1) and *Beattie* v. *Lord Ebury*. (4) This question did not really arise in *Smout* v. *Ilbery*. (8)]

The principle of the decision there was that an agent who is not aware, and has no means of knowing, that he has no authority is not liable.

(1) 8 E. & B. 647.
(2) 3 B. & Ad. 114; 37 R. R. 344.
(3) 3 B. & Ad. 124.
(4) (1872) L. R. 7 Ch. 777, 800.
(5) 18 Q. B. D. 54.
(6) Ante, p. 344.
(7) (1889) 14 App. Cas. 337, 365.
(8) 10 M. & W. 1, 9.

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In the present case Starkey had no means of judging as to the genuineness of the signatures to the powers, and he made no representation express or implied to the effect that the powers were properly executed. Further, the bank did not rely on any representation or implied warranty by him. They relied on the powers, they made their own inquiries, and were satisfied apparently. They have the means of testing the genuineness of a signature to a power, and the loss should fall upon them. They keep the register, and the risk is only the risk of forgery which every bank incurs. Brokers rely in these cases on the checks which the bank uses. Where one of two innocent persons must suffer a loss, the Court will throw the burden on the one of them who has been the sole means of producing the loss: Story on Agency, 9th ed. p. 313. Starkey was never told that there had been any doubt as to one of the signatures, or that the letter sent to the Wimbledon address had been returned through the Dead Letter Office. There is no case reported in which the bank has succeeded under circumstances such as these.

Latham, K.C., referred to *Sloman* v. *Bank of England.* (1)

H. D. Greene, K.C., was not called upon to reply.

KEKEWICH J. This is a case of considerable importance, but, to my mind, the question is a simple one of law, and of law only. There is really no question of fact in dispute at all. The law which I have to apply is laid down in two cases, to which only I need refer. It is thus stated in the judgment given by Willes J. in *Collen* v. *Wright* (2): "I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue." That is explained a little lower down on the same page thus: "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person

(1) (1845) 14 Sim. 475.

(2) 8 E. & B. 657.

who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist." The same doctrine is enunciated in a much later case than that, *Firbank's Executors* v. *Humphreys* (1), in the Court of Appeal, where Lord Esher says (2): "The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." The present Lord Lindley, then a member of the Court of Appeal, expresses it tersely, if I may venture to say so, thus (3): "Where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." That, he says, is an exception to the rule that an action for damages will not lie against the person who honestly makes a misrepresentation which misleads another.

That is the law which, as it seems to me, I have to apply. I propose to dispose of the question entirely on one point, which, strictly speaking, is not pleaded, but which seems to me to be far more important than any of the other points which are put forward. On December 23, 1897, and March 8, 1898, Mr. Starkey purported to transfer in the bank books Consols and bank stock—stocks which could only be transferred in the bank books—he signing as the attorney for the transferors, the present plaintiff and his brother, now deceased. The transfers, of course, were made out in the ordinary form as by the stockholders. That, to my mind, was in each case a complete representation by him that he transferred as the attorney of the two Olivers—in other words, that he was a person authorized to transfer in their names. I need not pause to consider whether that was a contract within the meaning of *Collen* v. *Wright* (4), which applies to contract only. I myself

(1) 18 Q. B. D. 54.
(2) Ibid. 60.
(3) 18 Q. B. D. 62.
(4) 8 E. & B. 647.

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should have had no doubt that the principle of *Collen* v. *Wright* (1) could not be confined to cases of contract in the strict sense of the word, but *Firbank's Executors* v. *Humphreys* (2) shews that the principle of *Collen* v. *Wright* (1) is applicable to transactions which may or may not be contractual, and the transaction in this case comes within the decision. Unless there is some answer to that in the arguments which I have heard on behalf of Mr. Starkey, it follows that Mr. Starkey is liable on that principle upon an implied contract to make good the loss which the bank has sustained by acting on the transfers and allowing the stock to pass into the names of other holders, the bank having been ordered to replace the stock and pay the back dividends.

The first objection is that Mr. Starkey behaved honestly—that is to say, he honestly believed that he had the authority of the principals in whose names he purported to act. That he did honestly believe it nobody could possibly doubt, and he is acquitted of anything approaching improper intent, or really, according to the ordinary course of business, neglect of due precaution, though it is common knowledge that in the ordinary course of business precautions are neglected which might with advantage and with a view to perfect safety be taken. Mr. Swinfen Eady cited *Smout* v. *Ilbery* (3) and *Polhill* v. *Walter* (4) as authorities to shew that that honest belief excuses Mr. Starkey. Passages may be found in the judgments to support that argument, but the cases do not really touch the point. *Smout* v. *Ilbery* (3) treats of the liability of an agent on the original contract into which he purported to enter on behalf of a principal, and *Polhill* v. *Walter* (4), which is explained in *Smout* v. *Ilbery* (3), turned on the pleadings. They are anterior to the doctrine of liability on an implied warranty, which is expounded and developed in the later cases already referred to. Those later cases have

(1) 8 E. & B. 647.
(2) 18 Q. B. D. 54.
(3) 10 M. & W. 1.
(4) 3 B. & Ad. 114; 37 R. R. 344.

[The second count of the declaration sought to charge the defendant as acceptor on the bill which, having no authority from the drawee, he purported to accept by procuration.—F. P.]

made no exception in favour of an agent acting honestly, and it is to be observed that Lord Lindley, in the passage in *Firbank's Executors* v. *Humphreys* (1) to which I have referred, says this (2): "Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another"; and then he makes this exception, namely, "Where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." It is clear that Lord Lindley intends the exception to cover the whole of the rule, and that the person who honestly makes the representation, but so as to come within the exception, is in his opinion liable for that misrepresentation.

The other objection—and there is only one other—is that the bank knew as much as Mr. Starkey knew himself; or, at any rate, that they had the means of knowing. To a great extent that was true. It is possible, of course, that Mr. Starkey might have taken means to verify the signature of his principal, but the bank might have had the means also if they had chosen to follow the matter out. The answer to that is that they are not bound to do anything of the kind. What is the extent of their obligations I do not pause to consider, but they certainly are not bound, as between them and the person who demands to act under a power of attorney, to see that that power of attorney has been properly executed. In the discharge of their duties they would probably think, as they always have thought, that it is not right to incur risk without all precautions that are reasonably possible, but they may throw the risk on him who claims to act as agent, and leave it to him to justify his position if unfortunately it is necessary to do so.

Then it is said that the practice of the bank to make inquiries was known to these stockbrokers, and it is the practice of stockbrokers to rely on the bank, and, knowing that the bank take these precautions, they are content to leave the bank to take the precautions which they always do, and which they did in this particular case. The stockbrokers cannot thus avoid their own responsibility. A great deal that the bank does in that way,

(1) 18 Q. B. D. 54. (2) 18 Q. B. D. 62.

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as explained by the witnesses, is obviously work of supererogation. They are not bound to do it, and they certainly are not bound to tell the stockbroker what they do, and as a matter of fact they do not tell. One witness particularly, the gentleman who was a member of the Committee of the Stock Exchange, was careful to say that he only knew of what was done externally. He does not know—the bank does not tell him, and would not be right in telling him—all that takes place within the walls of the bank itself. What is done by the bank affords no excuse. According to the authorities, Mr. Starkey has honestly misrepresented a fact; he has honestly misstated that he was the duly authorized agent of the two stockholders for the purpose of transferring the stocks. It is unfortunate for him that it turns out to be untrue, but, according to the law of England, as settled by the cases to which I have referred, he is liable for that misrepresentation in point of fact.

The bank have not been content to sue Mr. Starkey, who executed the transfers, but they endeavoured to make his two partners liable, and though it matters of course not a whit, because Mr. Starkey acted as one of the firm, and if he is liable that will no doubt set itself right as between himself and his partners, still I have to consider whether any relief can be granted against the partners. To my mind the partners were improperly made parties, and I do not think any relief can be granted against them. I am not proposing to go back to an exposition of the law: I shall take that for granted now; but let us apply it to what happened. The first thing that took place in each case was that Mr. Starkey and his two partners together applied for a power of attorney, and if it could be maintained that they were liable through a misrepresentation in doing that, they all three made a misrepresentation, and they all three would be liable. But what is the action which we are considering? I am treating it as if it were an entirely independent action, as perhaps it strictly ought to have been, though we are conveniently disposing of it on what is called a third party notice. It is an action on an implied warranty, and all the cases lay down without exception that the remedy against the

agent—that is to say, the person who has purported to act as agent when he had no authority—is on that implied warranty which has injured the plaintiff, and in the action only those damages can be recovered which have been suffered by reason of the breach of the implied warranty or implied contract. The gist of the action is warranty by the defendant, and injury to the plaintiff by breach thereof. It is not seriously suggested that the application for the power alone caused the bank any injury at all. What has been attempted is to link all the acts together, and then to ground an action on each of them considered with respect to the others. That I think is a fallacious way of treating an implied warranty. You may find an implied warranty in one document or in one act, and sue upon that, or you can put the two together and say they are one; but you cannot take three or four together and say they make an implied warranty, and then sue on each of the three or four portions. That seems to me entirely wrong. Nothing happened on this application at all. The power was issued, and it might very well have stopped there. I venture to say that if it had stopped there, and any fanciful person had endeavoured to found an action on that, it might have been got rid of in a very speedy way. The power was made out in the names of Mr. Starkey and Mr. Leveson. We have nothing to do with the other partner there. The demand to act on the power was by Mr. Starkey alone, and here I have not to consider the question of the other partners. Although the power was part of the history of the case, and it was necessary that it should be proved here, still it did not of itself injure the bank; it may have been a warranty of Mr. Starkey's authority, but until acted on it caused no injury. Again, the whole transaction might have stopped there. In fact, part of the case of the third parties is that it ought to have stopped there, and the bank ought to have found out that the power was a bad one. At any rate, there was no warranty there which led to any damages, and no damages could possibly be recovered. Besides that, there is the transfer ticket, which is a mere form apparently—a step in the transaction—and that is signed in each case by Starkey and Leveson. I will not repeat what I have said; but nothing

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came of that. It was only a step in the whole transaction, and it is quite impossible to sue for damages on that. It appears to me that an action founded on these documents must inevitably have failed against all the partners, including Mr. Starkey; but on the ground that he executed the transfers as attorney I hold him and him alone liable. As regards the actual result it is not material whether one member of the firm or all three members are liable, and I do not think that making only one liable when all are joined as parties ought to make any difference in the costs of what I will call the action.

Mr. Starkey must pay to the bank all that the bank are bound to pay to the plaintiff in the original action, including of course the costs which they have been ordered to pay, and must beyond that pay the costs of the third party notice.

There will be no order under the third party notice as against Messrs. Leveson and Cooke.

March 25. The case was again put into the paper to be mentioned on the minutes.

The judgment had been drawn up by the registrar on the footing that Starkey was not only liable to make good to the Bank of England the same amounts of stock as the bank were ordered to make good to the plaintiff, but was also liable to pay all the costs which the bank were ordered to pay in contesting the action by the plaintiff.

On behalf of the third parties, it was contended that the defence of the action was undertaken by the bank at their own risk; that inasmuch as the forgery was not really denied, they ought to have consented to judgment, or let it go by default, and that Starkey had neither expressly nor impliedly authorized the conduct of the action by the bank. It was true that Starkey had declined to undertake the defence of the action against the plaintiff, but he had not requested the bank to defend it, nor could the bank reasonably be treated as defending on behalf of Starkey.

KEKEWICH J., having pointed out that the costs in question were really payable as or in the nature of damages, referred to

the following passage in Mayne on Damages, 6th ed. pp. 98, 99: "One who professes to contract as agent for another must, unless there be something in the transaction to rebut the implication, be taken to warrant that the authority, which he professes to have, does in fact exist; and if he has no such authority, he is liable to make good to the person who enters into the contract upon the faith of his being duly authorized, all the damage which is the natural and proximate consequence of the false assertion of authority. This will include the costs of unsuccessful legal proceedings taken by such person against the supposed principal for the purpose of enforcing performance of the contract or recovering damages for its breach; if at least it was reasonable under the circumstances of the case that such proceedings should be taken, or if the professed agent was made aware of the litigation and sanctioned it, either expressly, or by allowing it to be continued without avowing his want of authority." His Lordship said that in his opinion the Bank of England were well advised in fighting the action. If they had taken a consent judgment or allowed judgment to go by default, they would have been liable to be called upon by Mr. Starkey to justify their conduct in so doing. The costs of the bank were reasonably incurred, and were the proximate consequence of the warranty given in point of law by Mr. Starkey to the bank. His Lordship, however, directed that Mr. Starkey should be at liberty to attend the taxation.

Solicitors: *Hores, Pattisson & Bathurst; Freshfields; Morley, Shirreff & Co.*

C. C. M. D.

COZENS-HARDY J.

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Jan. 11, 12, 21.

NEW YORK SECURITY AND TRUST COMPANY *v.* KEYSER.

[1900 N. 565.]

Lunacy—Foreign Committee—English Lunatic—English Property.

A foreign committee of the property of a domiciled Englishman, resident abroad and found to be a lunatic in the forum of his residence, cannot as of right recover personal property of the lunatic in this country.

The widow of a domiciled Englishman, who and whose relatives resided in New York, was found on a New York inquisition to be insane. A New York tribunal appointed a company committee of both the person and property of the lunatic.

The Court, in its discretion, though the lunatic's income was more than sufficient for her maintenance, ordered English trustees of personal property of the lunatic to pay accrued income, and gave the trustees liberty to pay future income to the committee.

Didisheim v. *London and Westminster Bank*, [1900] 2 Ch. 15, considered.

THIS was a petition to obtain payment of money representing income to a company who had been duly appointed by the Supreme Court of New York committee of the person and estate of Mrs. Samuels, a widow, of unsound mind, now resident in the State of New York.

Mrs. Samuels married the late Robert Samuels about December, 1881. Robert Samuels was born of English parents at Rio de Janeiro in 1846. His domicil of origin was English; he had lived in many countries, but it did not appear that he lost his domicil of origin, and it was assumed for the purpose of this application that the domicil of Mrs. Samuels was English. The marriage took place at San Francisco, California. Mrs. Samuels was previously to her marriage a domiciled citizen of California.

Mrs. Samuels became of unsound mind during the lifetime of her husband, and was placed at an asylum in Berlin. She recovered, and resided with her husband till his death in 1896. She afterwards relapsed, and was confined at a lunatic asylum in Brussels, whence she was removed by her own relations,

who reside in New York, to the Bloomingdale Asylum, White Plains, New York.

The plaintiff company were appointed committee of both the person and property of Mrs. Samuels by orders of the Supreme Court of New York, the Court having jurisdiction in lunacy in that State. They were authorized and directed by the Supreme Court of New York to take these proceedings.

The evidence before the Court upon the laws of New York shewed that the committee of the property of a person of unsound mind has a legal right to recover the income but not the capital of the insane person.

Mrs. Samuels was entitled to property in England—namely, (1.) a sum of money standing in her name in the books of Messrs. A. Keyser & Co., bankers, of London; (2.) the income of property in the hands of the trustees of an English post-nuptial settlement; and (3.) the income of property settled by the will of her father-in-law. An inquisition had been held in New York at which the jury found Mrs. Samuels to be a person of unsound mind, and that her only property consisted of some household furniture and the above items in England.

This action was commenced in April, 1900, by the New York Security and Trust Company and Mrs. Samuels, by Arthur Thomas Tallent, her next friend, against Messrs. A. Keyser & Co., the trustees of the marriage settlement of Mrs. Samuels and the trustees of the will of her father-in-law, claiming as against the defendant bankers payment to the plaintiff company of the money belonging to Mrs. Samuels in their hands, and as against the respective trustees accounts of the moneys of Mrs. Samuels in their hands, and payment to the plaintiff company.

An order had been made in the action, under which the defendant bankers had paid the money in their hands to the credit of the action. And under another order the trustees of the will of Ralph Henry Samuels had paid 500*l.*, income of Mrs. Samuels in their hands, to the plaintiff company for her maintenance. There was evidence that Mrs. Samuels' income was somewhat more than sufficient to defray the cost of her maintenance under the existing conditions.

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The sum in court now standing to the credit of the action was 2236*l.* 16*s.* The trustees of the will of Mr. Samuels, senior, had in their hands 60*l.* 1*s.* income, and the trustees of the settlement had 332*l.* 2*s.* 10*d.* in their hands.

Danckwerts, Q.C., and *Method*, for the plaintiffs. We ask the Court as matter of right to order the property in England to be delivered to the plaintiff company in the same way as it would have been delivered if situated in the State of New York and the lady were domiciled there. We contend that the logical consequence of *Didisheim* v. *London and Westminster Bank* (1), in the Court of Appeal, goes to that extent. If, however, the Court should be of opinion that the case of *Didisheim* v. *London and Westminster Bank* (1) does not strictly apply where the domicil of the patient is not that of her place of residence in the forum of which the curator or committee has been appointed, and where the domicil is in this country, the Court has jurisdiction to apply or authorize the application of the lunatic's property for her benefit through the medium of the foreign committee; and we ask the Court, in the exercise of its discretion, to order the accumulated income and future income to be handed over to the plaintiff company, who are responsible to the Court of New York, the State in which the lady and her relations reside: *In re Houstoun* (2); *In re Princess Bariatinski* (3); Foote on Private International Law, 2nd ed. p. 543.

Hon. E. C. Macnaghten, Q.C., and *G. S. Alexander*, for the defendant trustees. So far as the proceedings are taken in the name of the lunatic by her next friend, all that can be done is to do what is necessary to preserve the property of the lunatic; neither she nor her next friend can give a discharge. The Court will only administer the property of a lunatic, or direct it to be applied as far as necessary for the benefit of the lunatic. Nor can the foreign committee give a good discharge, unless under an order of the Court. The decision of *Didisheim* v. *London and Westminster Bank* (1) does not apply to the present case.

(1) [1900] 2 Ch. 15. (2) (1826) 1 Russ. 312.
(3) (1843) 1 Ph. 375.

The lady being an Englishwoman, the Court will not allow her property to be put out of its control. The Court will not recognise as final the decision of a foreign Court as to the status of a domiciled English person; for instance, as to marriage, bankruptcy, infancy, or lunacy: *Cooper* v. *Cooper* (1); *In re Artola Hermanos* (2); *In re Garnier.* (3)

[*Sottomayor* v. *De Barros* (4) and *Sottomayor* v. *De Barros* (5) were also referred to.]

All that the Court will do is to sanction the payment of a proper sum for the support of the lunatic, the Court itself being satisfied that the lunatic is being properly taken care of and that the amount allowed is necessary and proper.

Danckwerts, Q.C., in reply. This Court will recognise the proceedings of a foreign Court, though they may affect a person domiciled in England in respect of his status: *Cooke* v. *Vogeler Co.* (6), affirming in the House of Lords *In re A. B. & Co.* (7) The question of marriage stands in a different position from other matters, for persons cannot evade their own marriage laws by contracting an illegal marriage abroad.

COZENS-HARDY J. (after stating the facts). In these circumstances the action is brought by the committee and Mrs. Samuels, "a person of unsound mind, by A. T. Tallent, her next friend," as co-plaintiffs against the trustees. Now, if the lady had been domiciled in New York, the decision of the Court of Appeal in *Didisheim* v. *London and Westminster Bank* (8) would have been a direct authority. But Lindley L.J. says (9): "If, as *In re Garnier* (3), the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should feel considerable difficulty in holding that the Courts of this country were bound to recognise the title of a foreign curator to sue in this country." The point thus left open now arises for my decision.

(1) (1888) 13 App. Cas. 88, 99.
(2) (1890) 24 Q. B. D. 640.
(3) (1872) L. R. 13 Eq. 532.
(4) (1877) 3 P. D. 1.
(5) (1879) 5 P. D. 94.
(6) W. N. (1901) 2; [1901] A. C. 102.
(7) [1900] 1 Q. B. 541.
(8) [1900] 2 Ch. 15.
(9) Ibid. 51.

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Now the lady sues by a next friend as provided by Order XVI., r. 17, which refers to the old practice of the Court of Chancery. There is nothing in that order or in the established practice of the Court of Chancery prior to that order which entitles the next friend—who may be anybody—to receive and give a discharge for the lady's money. It is only on the footing that the action is for the benefit of the lady, and in so far as it is for her benefit, that the Court allows such an action to proceed: see *Light* v. *Light* (1); *Beall* v. *Smith* (2); *Jones* v. *Lloyd* (3); *Porter* v. *Porter*. (4) I cannot regard the action as for all purposes the same as it would be if Mrs. Samuels were of sound mind and suing in her own right.

But the lady joins as co-plaintiffs persons who are competent to receive and give a good discharge for her money, and she asks that payment may be made, not to Mr. Tallent, her next friend, but to them. I am not satisfied that the lady, suing by her next friend, can, as a matter of strict right, insist upon such payment, but in the exercise of my discretion I can see no reason why the order should not be made in the present case. The lady is by birth an American. Her relations reside in America. The New York Court has jurisdiction over her by reason of her residence in the State, and, wholly irrespective of any question of domicil, I am satisfied that everything that is proper and kindly is being done for her custody and her comfort. *Scott* v. *Bentley* (5), as explained and corrected by the Court of Appeal in *Didisheim's Case* (6), seems to me to warrant the view which, apart from authority, I should be prepared to adopt. The defendants are abundantly justified in the course they have taken of requiring the protection of an order of the Court. Their costs as between solicitor and client, including any charges and expenses properly incurred, must be paid out of the fund in court, and the balance of that fund, together with the sums of cash now in the hands of the trustees —the precise figures will doubtless be agreed—must be paid to the plaintiff company as committee.

(1) (1858) 25 Beav. 248.
(2) (1873) L. R. 9 Ch. 85.
(3) (1874) L. R. 18 Eq. 265.
(4) (1888) 37 Ch. D. 420.
(5) (1855) 1 K. & J. 281.
(6) [1900] 2 Ch. 15.

With regard to future income, I think it will be better simply to give liberty to the respective trustees to pay the income to the committee until further order, and general liberty to apply will be reserved.

Solicitors: *Taylor, Son & Humbert; Montagu, Mileham & Montagu.*

D. P.

BRITISH MUTOSCOPE AND BIOGRAPH COMPANY, LIMITED *v.* HOMER.

[1901 B. 104.]

Patented Chattel — Seizure and Sale under Distress for Rent — Right of Purchaser to use the same—Injunction—Distress Act, 1689 (2 *Will. & M. Sess.* 1, *c.* 5), *s.* 2.

The right which the owner of a patented chattel has under his letters patent of making and using the patented chattel and licensing others to use the same, is a right of an incorporeal nature. It is a chose in action, at any rate not in possession, distinct from the right of property in the chattel itself, and incapable of seizure under a distress for rent.

Where, therefore, a patented chattel on the premises of a licensee was seized by the landlord of the licensee under a distress for rent, and sold under 2 Will. & M. Sess. 1, c. 5, to a purchaser who bought it with notice of the conditions on which the licensee had it, an injunction was granted at the instance of the patentee restraining the purchaser from using the chattel.

MOTION.

The plaintiff company were the registered owners of certain letters patent for an invention relating to mutoscopes or devices for shewing the changing position of a body or bodies in action; and the co-plaintiffs (the London and District Mutoscope Company, Limited) were their licensees with the exclusive right to use and to license others to use coin-operating mutoscopes for exhibition purposes within the district of the County of London.

In October, 1900, the London and District Mutoscope Company, Limited, under a contract with one Maynard, delivered ten mutoscopes to him at his premises, No. 99,

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Whitecross Street, in the City and County of London, for exhibition upon the following conditions: (1.) The money to be collected fortnightly by your own man and checked by me or some one in my employ. (2.) I am to receive 25 per cent. of the gross takings by way of rent, payable when the collection is made. (3.) You are at liberty to move the machines at any time, giving seven days' notice in writing. (4.) The machines are to remain the sole property of yourselves. (5.) In the event of any machines ceasing to work I will give you notice at once, and the same is to be rectified by you and at your expense. (6) If at any time these premises change hands I agree to give you due notice, in order that you may remove the machines or arrange with new tenants. (7.) I undertake to protect machines from wilful damage so far as I am able. (8.) All coins found in the machines to be the property of yourselves, subject to the percentage above mentioned.

On December 23, 1900, Maynard being in arrear with the rent of his said premises, his landlord distrained upon the ten mutoscopes and seized the same for payment of the rent; and on January 5, 1901, the landlord caused the mutoscopes to be put up for sale by auction under the Distress Act, 1689, and at the sale the defendant purchased one of the machines. Both before and at the sale the plaintiffs gave the landlord and the auctioneers notice of their rights and of the conditions on which Maynard held the machines. After the sale correspondence ensued between the plaintiffs and the defendant, who claimed the right to use the machine he had purchased for any purpose and in any way he thought fit. Thereupon the plaintiffs issued the writ in this action claiming an injunction to restrain the defendant, his servants and agents, during the continuance of their letters patent dated, &c., from using, selling, letting, exhibiting, or dealing with the mutoscope coin-operating machine purchased by him. The plaintiffs now moved for an interim injunction.

It was agreed that the motion should be treated as the trial of the action; and the defendant admitted that he bought the machine with notice of the plaintiffs' rights and of the conditions on which Maynard held the machines.

E. H. Brydges, for the motion. The mutoscope is a chattel, but it is a patented chattel. The plaintiffs do not claim the right of property in the chattel, and admit the landlord had power to sell it under the statute; but the question is, whether the purchaser can use the chattel. It is a novel point. The plaintiffs claim that under the grant of their letters patent they have the sole right to make, use, exhibit, and sell the chattel. If they sell it, no doubt the right of user would pass with it, but that does not apply to any other person who sells without their consent and with notice of their rights: *Incandescent Gas Light Co.* v. *Cantelo* (1); *Incandescent Gas Light Co.*, v. *Brogden.* (2)

Defendant in person. I contend that the right to use the chattel is inseparably attached to it and passes with it, and that any person by putting a penny in the slot can operate it. The plaintiffs allowed this chattel to be on the premises of Maynard for the purpose of being used, and it was there subject to seizure by the landlord for his rent. That being so, the landlord could seize it and sell it to me under the statute, and I have at common law the right to use the machine I have bought without any restrictions.

E. H. Brydges, in reply.

Cur. adv. vult.

Jan. 24. FARWELL J., after stating the facts, continued:— No point was raised or argued on the question whether the machine, being on the premises for exhibition purposes, was within any of the common law exceptions to the general right of distress, and I accordingly express no opinion on this point. A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent from infringing such patent unless the defendant can shew a title direct or derivative from the patentee to use the patent; and it has recently been held in *Incandescent Gas Light Co.* v. *Brogden* (2) that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to use the patented invention

(1) (1895) 12 Rep. Pat. Cas. 262, 264.

(2) (1899) 16 Rep. Pat. Cas. 179 183.

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is bound by such conditions, and that such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all. The defendant, therefore, would be clearly liable in the present case unless the statute of William and Mary protects him; and he contends that the statute has this effect. At common law a landlord had no right to sell distresses, but only to detain them as pledges for enforcing payment. The right of sale, therefore, depends on the construction of the statute. Sect. 1 provides (I read it shortly) that, where any goods or chattels shall be distrained for any rent reserved and due upon any lease and the tenant or owner of the goods and chattels so distrained shall not within five days after such distress taken, and notice thereof left at the premises charged with the rent distrained for, replevy the same, the person distraining may in the manner pointed out by the Act appraise the goods and chattels seized and after such appraisement sell them for the best price. The Act obviously extends to goods and chattels belonging to persons other than the owner of the demised premises, and it is therefore impossible for the plaintiffs to succeed on the short ground that the mutoscope and the right to use it free from conditions were not the tenant's property. See *Lyons* v. *Elliott* (1), where Lord Blackburn says: "The general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid." But it is equally clear that the Act does not extend the common law right to seize, but merely adds a power to sell that which the landlord could seize at common law. The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land and he distrains by taking possession, in the nature of a pledge, of goods and chattels found upon such land. Thus, Coke upon Littleton, 47 a: "'Reserve to him a yearely rent, &c.' First, it appeareth here by Littleton that a rent must be reserved out of the lands or tenements, whereunto

(1) (1876) 1 Q. B. D. 210, 213.

the lessor may have resort or recourse to distreine, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties, priviledges, franchises, and the like." And with this accords Rolle's Abridgment, 446 (2.) and (4.), where, under the heading "Reservations," he says: "(2.) Un rent ne poet estre reserve hors d'ascun incorporeal inheritance come advowsons, commons, offices, corodies, mulcture d'un molyn, dismes, fairs, markets, liberties, priviledges, franchises et tiel semble. . . . (4.) Un rent ne poet estre reserve hors d'un chose que gist solment en grant pur ceo que nul distresse poet estre." See also *Jewel's Case*. (1) In distraining, therefore, the landlord looks to the land demised and to the goods and chattels found thereon. If the demise be of an incorporeal hereditament no entry can be made on it and no goods and chattels can be found on it: and in like manner, if the goods and chattels be of an incorporeal nature, they can have no local position upon the land demised and are incapable of seizure into the possession of the landlord. It is essential to a distress that the property distrained should be capable of physical possession. Now, a patent right is a privilege granted by the Crown in the exercise of its prerogative to a first inventor, and is described in Stephen's Commentaries, 11th ed. vol. ii. p. 8, as an incorporeal chattel. I should be disposed to classify it myself as a chose in action, which has been defined to be "a right to be asserted or property reducible into possession either by action at law or suit in equity": see *Fleet* v. *Perrins*. (2) I refer to the common form of a patent: "Know ye therefore, that we . . . . do by these presents . . . . give and grant unto the said patentee our especial licence, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may . . . . make, use, exercise, and vend the said invention . . . . and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention. . . . And to the end that the said patentee may have and enjoy the sole use

(1) (1588) 5 Rep. 3 a. (2) (1869) L. R. 4 Q. B. 500, 505.

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and exercise and the full benefit of the said invention, we do by these presents . . . . strictly command all our subjects whatsoever . . . . that they do not at any time during the continuance of the said term of 14 years, either directly or indirectly, make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same nor make or cause to be made any addition thereto or subtraction therefrom . . . . without the consent, licence, or agreement of the said patentee. . . ." Now this confers necessarily a right to bring an action to restrain infringement and to recover damages—at any rate, it is not a chose in possession. But a chose in action cannot be found upon the demised premises; it has no locality and is incapable of manual seizure, and this is borne out by the fact that for this reason choses in action could not at common law be taken in execution under a writ of fieri facias (Stephen's Commentaries, vol. iii. 598) or of levari facias: *Dundas* v. *Dutens*. (1) The landlord has seized a chattel, namely, the mutoscope, and the plaintiffs raise no claim to any property in this; but the patentee's right is entirely distinct from the right of property in the chattel; it is a right of action to prevent any dealing with that chattel in contravention of the letters patent, and such right is not part of, or capable of seizure with, the chattel, but is outside and antagonistic to the possessory title to the chattel. The plaintiffs' rights arise out of the grant under the Royal prerogative, coupled with s. 16 of the Patents Act, 1883, which enacts that "every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man." The landlord has not taken and could not take possession of these rights, and the defendant has purchased only such a chattel as the landlord could and did seize. Having regard to the decision in *Incandescent Gas Light Co.* v. *Brogden* (2), the defendant is in no better position than if Maynard had been a mere infringer. It is not a question of contract inter partes affecting a chattel seized and sold by a landlord, but of the absence of any licence, in the event that has happened, to use the patented invention. If the defendant's contention were correct, an infringer might

(1) (1790) 1 Ves. Jr. 196; 1 R. R. 112. (2) 16 Rep. Pat. Cas. 179.

fill his room with infringing articles and pay his rent by allowing the landlord to seize and sell them free from any right of the patentee to complain of the infringement. The plaintiffs are, therefore, entitled to an injunction as asked, and to the costs of the action.

Solicitors for plaintiffs: *Lloyd-George, Roberts & Co.*

H. L. F.

Followed. *Re* LATTA'S SETTLEMENT. [1949] 1 All E.R. 665.

In re MAYHEW. SPENCER *v.* CUTBUSH.

[1900 M. 3519.]

Power—Execution—Limited Power—Exercise by Will—"Appoint, Devise, and Bequeath"—Sufficient Reference—No other Power—Evidence.

A testatrix made the following disposition by her will:—

"I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between" four named nephews and nieces, "or such of them as shall be living at my decease." The four nephews and nieces survived the testatrix.

It appeared that the testatrix had a testamentary power of appointing a share of personal estate among her nephews and nieces, and evidence was tendered to shew that she had no other power of appointment:—

Held, that the evidence was admissible, and that the limited power was exercised.

In re Teape's Trusts, (1873) L. R. 16 Eq. 442, and *In re Swinburne*, (1884) 27 Ch. D. 696, followed.

Dictum of Chatterton V.-C. in *In re Richardson's Trusts*, (1886) 17 L. R. Ir. 436, 442, dissented from.

ADJOURNED SUMMONS.

By her will, dated June 9, 1898, a testatrix having appointed certain persons executors and trustees thereof, and having bequeathed certain legacies, proceeded as follows:—

"I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses)

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equally between" four named nephews and nieces, "or such of them as shall be living at my decease."

The testatrix died on September 18, 1900. The four nephews and nieces were still living.

It appeared that under the will of her father, William Mayhew, who died on November 30, 1859, the testatrix had a testamentary power of appointing a share of his personal estate among her nephews and nieces, and evidence was tendered to shew that she had no other power of appointment.

The question being raised whether the testatrix had exercised this power, this summons was issued to determine the point.

Coote, for the plaintiff, one of the trustees of William Mayhew's will, stated the question.

Butcher, *K.C.*, and *Gatey*, for the four nephews and nieces. The power is exercised. The bequest is in favour of objects of the power, and the word "appoint" is used. In addition to this we are entitled to shew that the testatrix had no other power: *In re Milner*. (1) There is a clear indication of an intention to exercise the power, which is not rebutted by the use of the words "my personal estate," the trust for conversion, or the direction to pay debts: *In re Milner* (1); *Pidgely* v. *Pidgely* (2); *In re Teape's Trusts* (3); *Cowx* v. *Foster* (4); *In re Swinburne*. (5)

[FARWELL J. There is no difficulty about the law. The only question is whether the use of the word "appoint" coupled with the fact that the four nephews and nieces are objects of the power is a sufficient reference: *In re Richardson's Trusts*. (6)]

In that case the testatrix had a general power, to which the word "appoint" was held to refer, and the suggestion of Chatterton V.-C. that he would have decided the same way in the absence of that general power is only a dictum.

The word "appoint" must refer to a power, though in the absence of other words of disposition it might operate as a

(1) [1899] 1 Ch. 563.
(2) (1844) 1 Coll. 255.
(3) L. R. 16 Eq. 442.
(4) (1860) 1 J. & H. 30.
(5) 27 Ch. D. 696.
(6) 17 L. R. Ir. 436, 442.

devise, or bequest, or, in the case of a deed, as a grant: Elphinstone on the Interpretation of Deeds, p. 42.

J. Samuel Green, and *J. Alexander Hay*, for persons claiming in default of appointment. Evidence that the testatrix had no other power is inadmissible: *In re Huddleston.* (1) The burden of shewing intention lies on those who assert that the power was exercised: *In re Mills.* (2) In the present case the use of the words "my personal estate," the trust for conversion into money, and the direction to pay debts, all tend to shew that the testatrix was referring to any general power she might have at the time of her death, and not to this limited power; *In re Mills* (2); *In re Cotton* (3); *In re Williams* (4); *In re Hayes.* (5)

FARWELL J. This case is very near the line, but I have come to the conclusion that the limited power was exercised. I start with the fact that the gift is to objects of the power. It is plain on the authorities that a mere direction to pay debts out of the fund is not enough to negative an intention to exercise the power. In addition to this, there is evidence that the testatrix had no other power. It was contended that evidence of this fact was not admissible, but in my view it is admissible both on the authorities and on general principles. Where there is a devise of real estate, the Court has to ascertain whether there is any real estate to which the devise can refer, and similarly where a testator appoints personal estate under a power the Court must inquire whether there is a power of appointment and to what it extends. The evidence shews that the testatrix had this one limited power and no other power at all. She uses the words "I appoint, devise, and bequeath." Now, the word "appoint" is a word of art, prima facie having reference to powers only. I do not of course say that if there were no other words of disposition the word "appoint" in itself would not pass all the testatrix's property. But here I have the three words "appoint, devise, and

(1) [1894] 3 Ch. 595.
(2) (1886) 34 Ch. D. 186.
(3) (1888) 40 Ch. D. 41.
(4) (1889) 42 Ch. D. 93.
(5) [1900] 2 Ch. 332.

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bequeath," and the word "appoint" in this collocation necessarily refers to a power. I therefore read the will as if the testatrix had said, "I devise and bequeath, and in exercise of every power enabling me in this behalf I appoint." I felt a little doubt at first whether the word "appoint" might not be satisfied by limiting its reference to any general power the testatrix might have at the time of her death. The words "my personal estate" seem at first sight to point to this view. But the same consideration would have applied in *In re Teape's Trusts* (1) and *In re Swinburne* (2), especially the latter, where the testatrix devised, appointed, and bequeathed all the real and personal estate of which she might be seised or possessed at the time of her decease, or over which she might have any testamentary power of disposition, to trustees upon trust for sale and conversion and payment of debts, &c.; but it was nevertheless held that there was a sufficient reference to a special power.

In the present case the words "devise and bequeath" would be sufficient in themselves to execute a general power; so that I am only following the general rule of giving effect so far as possible to every word used by the testator if I say that the word "appoint" must necessarily refer to a special power.

My only ground for hesitation is an expression of opinion by Chatterton V.-C. in *In re Richardson's Trusts*. (3) It is not a decision on the point. The words of disposition in that case were, "I give, devise, bequeath, and appoint," and the testatrix had a general power. Chatterton V.-C. held that the word "appoint" was satisfied by applying it to the general power, but in the course of his judgment he said: "The argument on one side turns only on the use of the word appoint; that on the other on the insufficiency of this without more to indicate the intention, and also on the description of the subject of gift as 'all *my* real and personal estate and effects of every kind.' Property which was not that of the testatrix, but over which she had a special power of appointment, cannot, without the aid of a strong context, be held to be described by these words. No

(1) L. R. 16 Eq. 442. (2) 27 Ch. D. 696.
(3) 17 L. R. Ir. 436, 442.

such context exists here except merely the word 'appoint'; and even if the testatrix had no general power of appointment, I think that I should go beyond any decided cases and beyond the principle on which those cases proceed, if I were to hold that this was sufficient."

This dictum should probably be read with reference to the will before Chatterton V.-C. If it was intended as a general dictum so as to be applicable to the will before me, I respectfully dissent from it. In the present case I think the context shews that the word "appoint" refers to the special power, which is therefore duly exercised.

Solicitors: *Herbert Edward Griffith; Paterson, Candler & Sykes, for A. J. Ellis, Maidstone.*

G. R. A.

In re BEVERLY. WATSON *v.* WATSON.

[1900 B. 4952.]

Executor—Legacy—Residue—Appropriation of Specific Assets—Leaseholds—Settled Shares—Sale and Conversion—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 4, *sub-s.* 1.

The principle upon which executors and trustees under a will which contains a trust for sale and conversion have power to appropriate any specific part of the residuary estate towards satisfaction of a legacy or share of the residue, is that they have power to sell the particular asset to the legatee, and to set off the purchase-money against the legacy. The doctrine, therefore, is not confined to pure personal estate, but extends to chattels real, and (*semble*) to real estate which is subject to a trust for sale and conversion.

Sect. 4, sub-s. 1, of the Land Transfer Act, 1897, applies to personal estate as well as to real estate; but it does not, where there is a trust for sale and conversion, take away the former power of appropriation.

SUSAN BEVERLY by her will, dated June 26, 1899, appointed the plaintiffs executors and trustees of her will, and after making certain specific and pecuniary bequests appointed that all the property subject to general testamentary powers of appointment respectively conferred on her by the will of her

BUCKLEY, J. 1901 BEVERLY, *In re.* WATSON *v.* WATSON.

late husband and her marriage settlement should be transferred to the trustees of her will, and directed that they should hold the same and all other property of which she should die possessed "upon trust to sell, call in, and convert into money all the said property and funds at such times and in such manner as they shall think fit, and so that they shall have the fullest power and discretion to postpone the sale, calling in, or conversion of the whole or any part thereof during such period as they shall think proper without being responsible for loss." And out of the moneys to arise from such sale, calling in, and conversion or forming part of the said property and funds to make certain payments, and subject thereto to hold the net residue upon trust to divide it into nine equal parts. The testatrix directed her trustees to pay two of these equal ninth parts to her sister, the plaintiff Euphemia Watson, two other equal ninth parts to her sister, the defendant Grace Watson, and two other equal ninth parts to her sister, the defendant Emily Jane Watson; and she settled one of the three remaining ninth parts upon her brother, the defendant John Watson, and his wife and children, another ninth part upon her sister-in-law Mabel Watson and her children, and the remaining one-ninth part upon her sister, the defendant Elizabeth Sophia Annesley, and her husband and children. She directed the trustees to appropriate funds to meet annuities; to invest in any investments authorized by law, in Colonial Government securities, corporation stocks in England or Wales, and debentures of certain companies, and authorized her trustees to sell, vary, and exchange investments. There was no express power to appropriate specific assets to answer the shares in the residue.

The testatrix died on July 11, 1899. All her debts had been paid, and the residue of her estate amounted to about 110,000*l.*

The trustees proposed instead of realizing the whole of the estate to appropriate certain leasehold houses and other property amongst the beneficiaries at a valuation.

Euphemia Watson had agreed to accept as part of her two-ninths a leasehold public-house and three leasehold houses. Grace Watson was willing to take a leasehold house, and Emily Jane Watson a reversionary interest in 1180*l.* Great Indian

Peninsula Railway Company 5 per cent. guaranteed stock. The trustees were of opinion that this course would save expense, and they took out a summons to determine whether, (1.) notwithstanding the trust for sale and conversion, the plaintiffs as trustees of the residuary estate might lawfully appropriate the houses and the reversion in part satisfaction of the shares of Euphemia, Grace, and Emily Jane Watson at valuations which had been made and the amounts of which were stated, and (2.) whether the plaintiffs might appropriate other assets of the testatrix being of a nature authorized by the will or by law as trust investments towards satisfaction at a proper valuation of the shares of other beneficiaries under the will.

R. B. Yardley, for the plaintiffs. The power of executors to appropriate any part of the residuary estate of the deceased towards satisfaction of a legacy or share of the residue is not abolished by s. 4, sub-s. 1, of the Land Transfer Act, 1897. That section provides for appropriation on certain conditions, and was intended to refer only to real estate. The Act was passed to amend the Land Transfer Act of 1875, and both Acts deal with land. By s. 1 of the Act of 1897, real estate devolves on the personal representative, and the intention was to give executors power to appropriate land in addition to their former power of appropriating personalty. There is nothing to interfere with that power. If s. 4, sub-s. 1, does apply to personal estate there can be no appropriation, for no rules have yet been drawn up under the section, and it is inoperative. Sub-sects. 2 and 3 clearly relate only to real estate.

Before the Act executors had the power to appropriate leaseholds, although there does not appear to be any reported case to that effect. The judgments in *Elliott* v. *Kemp* (1) and *In re Lepine* (2) would cover leaseholds. There is no difference for this purpose between chattels real and other chattels. In this case there is a trust for sale and conversion, and a legatee can take a specific part of the estate and justify it as a purchase, subject in the case of settled shares to the part taken being

(1) (1840) 7 M. & W. 306. (2) [1892] 1 Ch. 210.

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within the power of investment: *In re Nickels* (1); *Re Brooks* (2); *In re Richardson.* (3) There is no reason why executors should not sell leaseholds and reversions to beneficiaries.

Stanley Fisher, for Elizabeth Sophia Annesley and her infant children. If executors ever had power to appropriate leaseholds, that power has been taken away by the Land Transfer Act of 1897. Appropriation can now only be carried out as directed by s. 4, and the fact that no rules have been drawn up to shew how that is to be done is immaterial. The whole of the testatrix's property of every description is covered by s. 4, sub-s. 1. If these leaseholds had been registered the appropriation must have been in accordance with the procedure of sub-s. 1, for otherwise the legatee could not have had his name placed on the register: Rule 130 of the Land Transfer Rules, 1898, Form 47; Brickdale and Sheldon on the Land Transfer Act, pp. 273–276, 371, 427. Leaseholds are within the meaning of "land" as defined by ss. 4 and 11 of the Act of 1875, and s. 24 of the Act of 1897.

R. B. Yardley, in reply.

Cur. adv. vult.

Jan. 29. BUCKLEY J. stated the facts, and continued:—The cases are numerous in which it has been held that executors and trustees have power to appropriate personal estate under such circumstances as arise in this case. For instance, in *Elliott* v. *Kemp* (4), appropriation of furniture; in *Barclay* v. *Owen* (5), and again in *In re Lepine* (6), appropriation of a mortgage debt; in *In re Richardson* (3), and again in *Re Brooks* (2), appropriation of shares in a brewery company; in *In re Nickels* (1), appropriation of stock; and in *In re Waters* (7), appropriation of mortgages and other securities have all been held to be valid. In some of those cases there was a trust for conversion; in others there was not. There was no trust for conversion in *Elliott* v. *Kemp* (4), in *In re Richardson* (3), or in *Barclay* v. *Owen*. (5) In each of the other cases there was a

(1) [1898] 1 Ch. 630.
(2) (1897) 76 L. T. 771.
(3) [1896] 1 Ch. 512.
(4) 7 M. & W. 306.
(5) (1889) 60 L. T. 220.
(6) [1892] 1 Ch. 210.
(7) W. N. (1889) 39; 24 L. J. (Notes of Cases) 36.

trust for conversion. Counsel have not referred me to, and I have not found, any case relating to appropriation of chattels real. The question I have to determine is whether, under circumstances such as these, a valid appropriation can be made of chattels real.

Now, in order to determine that, I ask myself what is the principle upon which appropriation is proper. Where, as in *In re Richardson* (1), there is no trust to convert, but simply a gift of property amongst certain parties, appropriation would seem easy; the parties are to have the property unconverted, and the executors must arrive at equality as best they can. Where there is a trust for conversion, what is the principle? Under a trust for conversion each person is entitled of course to money, and the principle, I apprehend, is this: that where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold.

Now, when I look at the authorities, it seems to me that that is the principle upon which this proceeds. That is to be found most plainly, I think, in the case of *In re Lepine.* (2) The appropriation there was of a mortgage debt. Lord Lindley puts it upon this principle. He says: "If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, 'I will not trouble you to turn my share into cash; give me something instead of it which I will take'?" And again (3): "The executor might have said to the legatee, 'I can sell you this mortgage for 700*l.* Will you buy it, and will you agree to set off your legacy against the purchase-money?' All that might have been gone through; but the substance of that has been done." Bowen L.J. says (4): "It cannot be doubted that

(1) [1896] 1 Ch. 512.
(2) [1892] 1 Ch. 210, 215.
(3) [1892] 1 Ch. 216.
(4) Ibid. 217.

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the executor might have sold the mortgage by private contract for what it was worth. It cannot be doubted that he might sell it to the legatee, and agree to set off the purchase-money against the legacy; and then he might further agree with the legatee that he should hold the legal estate for him. The whole of that can be put in a short compass, and it is exactly what has been done"; and Fry L.J. says (1): "There is no objection whatever to their entering into arrangements which are of the nature of the sale of a particular asset, which they are bound to convert, to a cestui que trust, setting off the purchase-money for that asset against the portion which the cestui que trust is entitled to in the testator's estate." I apprehend, therefore, that the true principle is, that where there is a trust for sale and conversion it is competent to the executor and trustee to say to a person who is entitled to the proceeds of the conversion, "I will agree with you to give you this property, without converting it, in satisfaction pro tanto of the money which would be coming to you if I did convert it." Moreover, that principle would not be necessarily confined to the case where there was a trust for sale and conversion, for it may be that the circumstances would be such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in ordinary course of administration apart from any trust for sale and conversion; but where there is a trust for sale and conversion, as here, then it seems to me that the matter is plain.

Now, if that is the principle, it is obvious that the doctrine of appropriation is not confined to pure personal estate, but extends to chattels real, and extends also, I conceive, to real estate which is subject to a trust for sale and conversion. There is no difference in principle. The only question would be whether under the old law the executor would have the control of the real estate so as to hand it over. Here there is a trust for sale and conversion. It appears to me that it is competent for the executors to agree with the cestuis que trust to appropriate to their shares of the residuary estate the leaseholds unconverted.

(1) [1892] 1 Ch. 219.

But then a question has been raised whether that state of the law is altered by s. 4, sub-s. 1, of the Land Transfer Act of 1897. It has been argued before me that, having regard to the connection in which s. 4 of that Act is found, it is to be read as confined to real estate, and does not extend to chattels real. I do not think that contention can be maintained. When I look at the 4th section, I find that the language is this: that "the personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate"—residuary estate there must mean residuary estate whether it be personal or whether it be real: it cannot be confined to real estate—"appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy." It seems to me that the residuary estate there must mean what it has meant before: it must mean any residuary estate be it personal or be it real estate. So that I think that s. 4, sub-s. 1, of the Land Transfer Act applies as far as it is applicable at all to the present state of things.

Then the argument presented to the Court was that, having regard to s. 4, sub-s. 1, of the Land Transfer Act, the power of appropriation which existed before the Act was done away with, and that an executor must now follow the provisions of the Act as to certain notices and the like, and that unless he does so he cannot appropriate at all. It seems to me that that is an argument which cannot prevail. If the principle be such as I have stated, that under a trust for sale and conversion you may give the beneficiary the property in satisfaction pro tanto of the money which would be coming to him if you did convert, I do not see that the Act has done anything to take that away. The Act may have some application to cases in which there is no trust for sale and conversion, where you are going to appropriate under such circumstances as in *In re Richardson.* (1) As to that I say nothing. It is quite sufficient for me to deal with the case before the Court.

(1) [1896] 1 Ch. 512.

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Where there is a trust for sale and conversion, I do not see that that section of the Land Transfer Act has made any difference to that which was the power before.

Under those circumstances it seems to me that the executors and trustees of this will have power to appropriate these particular portions of the estate towards satisfaction of these shares. That answers the first question upon the summons which is addressed to the three shares of Euphemia, Grace, and Emily, who take absolutely. They have power to consent to the appropriation, and if they do consent—well and good. But the second question relates to the three ninth shares which are settled. As to these a different principle comes in. The trustees of the settled shares can only consent to take—in satisfaction of what is given to them—such investments as are authorized by the instrument which creates the settlement. This will contains certain clauses as to investment, and there cannot, I apprehend, be appropriated to those three ninth shares any investments which do not fall within the scope of the investments allowed by the will. Subject to that, I think appropriation may be made under the settlement.

Solicitors : *Godden, Son & Holme.*

H. C. R.

In re SMITH'S SETTLED ESTATES.

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1901

Feb 5.

[1900 S. 4778.]

Settled Land—Incumbrance—Discharge—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 11—*Expenses of making Street—Charge on Premises—Payment by Owner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.

The tenant for life of an estate paid expenses which had been incurred by a local authority and made a charge upon the estate by s. 257 of the Public Health Act, 1875 :—

Held, that this was a charge on the inheritance, and that he was entitled to keep it alive as an incumbrance on the settled land, and to raise money under s. 11 of the Settled Land Act, 1890, by mortgage of the estate for the purpose of discharging it.

ADJOURNED SUMMONS.

John Smith by his will devised real estate, including the Lodge estate, Mill Road, Cambridge, to trustees to the use of his son George Smith during his natural life, and after his death upon trust as therein mentioned.

The Lodge estate was bounded by roads which were not yet made up as streets, and in 1895 the corporation of the borough of Cambridge, acting as an urban district council, gave notice to George Smith requiring him to level, pave, flag, and channel the street. Subsequently the corporation themselves executed the works, and by notice of apportionment called upon George Smith to pay 678*l.* 17*s.* 10*d.* as his proportion of the expense. On August 3, 1900, upon the complaint of the corporation, the court of summary jurisdiction for the borough of Cambridge made an order upon him forthwith to pay this sum, and on the same day he paid it out of his own pocket. He alleged that he made the payment in order to avoid further proceedings, but not with the intention of benefiting the inheritance, and he took out this summons asking, inter alia, for a declaration that he had power under s. 11 of the Settled Land Act, 1890, to raise by mortgage of the settled land, or of any part thereof, the money required to discharge the sum of 678*l.* 17*s.* 10*d.* paid

BUCKLEY J. 1901 SMITH'S SETTLED ESTATES, *In re.*

by him, and also the amount properly required for payment of the costs.

W. Brinton, for the tenant for life. These expenses are a charge upon the whole inheritance: *Birmingham Corporation* v. *Baker* (1); s. 4 of the Public Health Act, 1875. The charge is created by s. 257 of that Act, and is an "incumbrance" to discharge which the tenant for life is entitled, under s. 11 of the Settled Land Act, 1890, to raise money by mortgage of the settled estate. Under s. 25 of the Settled Land Act, 1882, capital money might have been spent for this purpose, but unfortunately there is none. It will be presumed that the tenant for life intended to keep the charge alive in his own favour, so the fact that he paid the money is of no consequence: *In re Harvey* (2), following *Burrell* v. *Earl of Egremont*. (3) His charge is now substituted for that created by the Act in favour of the corporation, who might have assigned it to him.

A. Roscoe, for the trustee. There is no incumbrance to which s. 11 of the Settled Land Act, 1890, can apply. The expenses are only charged on the land until they are recovered. It is a purely statutory charge. The tenant for life is the "owner" within s. 4 of the Public Health Act, 1875. He is the proper person to pay: he has paid, and the charge has come to an end.

[BUCKLEY J. As between himself and the local authority the tenant for life was bound to pay, but not as between himself and the remaindermen.]

The charge was on the tenant for life's property and cannot be kept alive against the inheritance.

BUCKLEY J. It seems to me that this money was payable in respect of expenses incurred by the local authority which they could recover from the owner, and which until recovery were a "charge on the premises in respect of which they were incurred" within s. 257 of the Public Health Act, 1875. The tenant for life was the owner of the premises and under s. 150

(1) (1881) 17 Ch. D. 782. (2) [1896] 1 Ch. 137.
(3) (1844) 7 Beav. 205, 232.

was liable to pay for these works, but the expenses were charged upon the inheritance in the first instance. He has paid them, and he is entitled to be recouped and to keep the charge alive in his own favour. In my opinion, he can also say that this is an incumbrance within s. 11 of the Settled Land Act, 1890, and raise the money necessary for discharging that incumbrance and the costs as asked by the summons.

Solicitors: *Field, Roscoe & Co., for Ginn & Matthew, Cambridge.*

H. C. R.

In re MOORE. MOORE *v.* MOORE.

[1901 M. 287.]

Estate Duty—Incidence—Will exercising Power of Appointment—Appointed Fund—Residue—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund passes to the executor as such, and, consequently, the estate duty in respect thereof is payable out of residue.

In re Treasure, [1900] 2 Ch. 648, not followed on this point.

ADJOURNED SUMMONS.

The question raised by this application was whether the estate duty payable in respect of an appointed fund ought to be borne by the property appointed or by the residuary estate.

Under the will of Charles Moore, who died in August, 1869, a legacy of 5000*l.* and a share of the testator's residuary estate, with accretions thereto, were directed to be held by the trustees of the will upon trust for the testator's daughter Marion Edith Moore for life, and after her death, in the event (which happened) of her having no children, one moiety of the said legacy, share of residue, and accretions was to be held upon such trusts as the said Marian Edith Moore should by will appoint.

Marian Edith Moore, who died in August, 1899, by her will appointed that "all the funds and property over which under the will of my late father Charles Moore I have a general power of appointment" should be held as to one moiety upon

BUCKLEY J. 1901 MOORE, *In re.* MOORE *v.* MOORE.

trust for the children of her brother Arthur John Moore, and as to the other moiety upon trust for the children of a deceased niece; and, after various specific devises and bequests, the testatrix devised and bequeathed all her property whatsoever and wheresoever, not thereby otherwise disposed of, unto her niece Edith Moore absolutely, and appointed her said brother, Arthur John Moore, executor of her will.

The total amount of the property passing on the death of Marian Edith Moore on which estate duty was payable was 33,400*l.*; the value of the appointed fund was 16,182*l.* Estate duty on the whole estate amounting to 1520*l.* 12*s.* 7*d.* had been paid by the executor; of this amount the proportion attributable to the appointed fund was 740*l.* 11*s.* 3*d.* The executor now applied by originating summons for the determination of the question whether the residuary legatee or the appointees were to pay the estate duty attributable to the appointed fund.

Dauney, for the plaintiff, the executor, stated the case.

P. S. Stokes, for the residuary legatee. The estate duty in respect of the appointed fund is payable out of the appointed fund, not out of residue: the appointed fund does not pass to the executor as such; a rateable part of the estate duty is therefore payable out of the fund under the Finance Act, 1894, s. 9, sub-s. 1: *In re Treasure.* (1) That decision is precisely in point.

[BUCKLEY J. In that case the testatrix had given a special direction to pay her testamentary expenses out of residue, so that the first part of the judgment is only a dictum: it was not necessary for the purposes of the decision.]

It was a considered judgment on the very point now before the Court. The fund in the hands of the trustees of the father's will is equitable assets of the testatrix, but does not pass to her executor as such, though he can no doubt give a good discharge for it: *In re Hoskin's Trusts.* (2) This case was based on *Re Philbrick's Settlement* (3), and is confined to the exercise of a power of appointment by a married woman. The

(1) [1900] 2 Ch. 648. (2) (1877) 6 Ch. D. 281.
(3) (1865) 34 L. J. (Ch.) 368.

dictum of James L.J. in *In re Hoskin's Trusts* (1), extending the principle of that case to the will of any person exercising a general power of appointment, was not necessary for the decision of the case, and is inconsistent with *Re Philbrick's Settlement*. (2) The effect of a testamentary appointment is essentially different from that of a testamentary disposition. *In re Treasure* (3) is a clear authority in favour of the residuary legatee. [*Cook* v. *Gregson* (4) was also referred to.]

Hon. F. Russell, for the appointees. *In re Treasure* (3) is inconsistent with *In re Hoskin's Trusts* (1), which decides that the executor, when he has proved the will, is entitled to receive the appointed fund: the executor only gets this right virtute officii; the appointed fund therefore passes to the executor "as such," and the estate duty is payable out of the residuary estate.

Stokes, in reply, referred again to *In re Treasure*. (3)

BUCKLEY J., after shortly stating the facts, continued:—The executor has paid the duty on the appointed fund, some 740*l*., and the question is whether that amount ought to be borne by the general residue or ought to be borne by the appointed fund. This question turns on the language of s. 9, sub-s. 1, of the Finance Act, 1894, which provides that "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable." If this property did pass to the executor "as such," the duty ought to be paid out of residue; if it did not, then it ought to be paid out of the appointed fund.

Now, it is familiar law that where a person has a general power and exercises it, the fund which is the subject of the power becomes assets for payment of debts. In *Re Philbrick's Settlement* (2) Lord Romilly decided this—that where a married woman having a general testamentary power executes a will exercising the power and appointing executors, the duty of administering the fund rests, not in the trustees of the

(1) 6 Ch. D. 281.
(2) 34 L. J. (Ch.) 368.
(3) [1900] 2 Ch. 648.
(4) (1856) 3 Drew. 547.

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deed which contains the power, but in the executors of the person who exercises the power. The substance of his judgment is—that where a married woman having no power of making a will, except by virtue of a testamentary power, does execute a will and appoint executors, she must be treated as having appointed the executors simply for the purpose of dealing with the property which is subject to the power, and that in that sense the executor of her will becomes trustee of the fund. From this Lord Romilly held that it follows that the trustees of the deed ought to hand over to the executors of the will the fund in question in order that they may administer it. It appears to me that the whole result of that decision is this: that as between the trustees of the deed and the executors of the will, the latter replace the former for the purpose of administering the fund. It, in my opinion, decides nothing as to the character in which the executors take the property for the purpose of dealing with it, as between the creditors of the person who has the general power and the appointees. That decision was followed by *In re Hoskin's Trusts*. (1) That was again the case of a married woman; but James L.J. in delivering judgment says this (2): "I may add that if the merits had to be gone into, I should hold it to be established beyond all question that where a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." I do not think that you could find language to express more appositely that the material fact by which the executor becomes entitled to receive the fund is, that he has proved the will, that is to say, that he has clothed himself with the character of executor, and he gets the fund, therefore, as it appears to me, according to what James L.J. then said, by reason of his being executor and "as such."

Let me examine this a little further upon principle. When the executor has thus obtained the fund, what is his duty? His duty is, if necessary, to use the fund as assets for payment

(1) 6 Ch. D. 281. (2) 6 Ch. D. 283.

of debts, and his duty towards the appointees is only to hand over to them what remains after discharging that first duty. It seems to me quite plain from that, that he is not simply constituted a trustee in the sense that he steps into the shoes of the trustees of the deed for the purpose of administering the funds towards the appointees; it is obvious that he has another duty which the trustee of the deed had not, namely, the duty before he hands anything to the appointees to take the whole fund, or as much as is necessary to satisfy the debts of his testator. I ask myself, Whence did he get that? How did any right in respect of that come to him? I know of no source from which it can come to him except from the fact, as the Lord Justice says, that he has proved the will; it is because he has proved the will as executor that he gets the fund and applies it, if necessary, in discharging his testator's debts; and he only becomes trustee, in the sense of trustee of the fund for the appointees, at the date when he has discharged that first duty. Upon principle, therefore, it would seem to me that the fund does come to the executor as such.

But it is said that Kekewich J. in *In re Treasure* (1) has decided the contrary. Upon that decision I have to observe that the second ground upon which the learned judge decided the case was a sufficient ground to cover the whole matter with which he had to deal. The will there contained a direction to pay testamentary expenses out of residue, and the learned judge held that estate duty was a testamentary expense; if so, the testator had directed that this estate duty, on whomsoever it would otherwise have fallen, should be paid out of residue, and he so held. That was sufficient for the whole of his decision. In the early part of his judgment he did nevertheless examine the question whether or not the exercise of the general power of appointment made the property pass to the executor as such, and he held that it did not. Now, I apprehend that the true way to use authorities is to examine the principle upon which they are based, and to follow the principle. If located in any other way, decisions may often be erroneously used. Now, the principle that I find in the earlier part of

(1) [1900] 2 Ch. 648.

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Kekewich J.'s judgment is this, that *Re Philbrick's Settlement* (1) and *In re Hoskin's Trusts* (2) have laid down certain rules, and in stating what they have decided I entirely agree with the learned judge. He finds that *Re Philbrick's Settlement* (1) decided that the executors took as trustees, and that *In re Hoskin's Trusts* (2) has, by the words of James L.J., extended the principle beyond the case of a married woman to the case of any person having a general power of appointment. So far as that I go entirely with the learned judge. But then, by a reasoning which I confess I have difficulty in following, he comes to the conclusion that nevertheless the appointed fund does not pass to the executor as such. If by that the learned judge means that in *Re Philbrick's Settlement* (1) and *In re Hoskin's Trusts* (2) it had been decided that the executors took as trustees for the appointees, as distinguished from persons having the administration of the fund for all purposes—that is to say, for creditors first and then for the appointees—I regret to say I am unable to agree with him. I do not follow the decision, therefore, on two grounds: first, because upon this point it is but dictum, having regard to the latter part of the judgment; and, secondly, because I do not find in it any principle which, having regard to what had been previously decided in *Re Philbrick's Settlement* (1) and *In re Hoskin's Trusts* (2), I can treat as binding upon me. I hold, therefore, that the appointed fund did pass to the executor as such, and consequently that the duty in respect of it ought to be paid out of residue.

Solicitors: *Parker, Garrett & Holman.*

(1) 34 L. J. (Ch.) 368. (2) 6 Ch. D. 281.

W. C. D.

BUCKLEY J.

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Feb. 28; *March* 1, 2.

In re GARDINER. GARDINER *v.* SMITH.

[1900 G. 2201.]

Will—Accumulation—Leaseholds—Insurance—Accumulations Act, 1800 (*Thellusson Act*), (39 & 40 *Geo.* 3, *c.* 98).

A direction in a will to apply a yearly sum out of the rents of leaseholds, held for a term of more than twenty-one years from the testator's death, in effecting and keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, is not a direction to accumulate and does not fall within the Thellusson Act.

WILLIAM GARDINER by his will, dated October 27, 1893, devised and bequeathed all his real and personal estate to trustees, and directed as follows: "And I further declare that my trustees shall stand possessed of my leasehold houses known as Nos. 94, 96, 98, 100, 102, 104, and 106, Liverpool Road, Islington, in the county of Middlesex (the leases of which have only about thirty-three years to run), and shall collect and receive the rents and profits thereof, and after paying thereout the rents reserved by the said leases under which I hold the said premises and all other necessary outgoings, if any, and the expense of keeping the same insured against loss or damage by fire and in good repair, and otherwise performing the covenants of the said leases, and the interest on the mortgages of same and the annuity charged upon the same, upon trust to set apart yearly during the residue of the term upon which I hold the same out of the net rents and profits thereof the clear yearly sum of 50*l.*, which said sum of 50*l.* I direct my trustees to pay and apply in or towards the effecting and keeping on foot a policy or policies in some good insurance office in London to secure the replacement at the termination of the said term of the capital that will be lost through not selling the said leaseholds." And he declared that the rest of the rents and profits should fall into and become part of his residuary estate.

BUCKLEY J. 1901 GARDINER. *In re.* GARDINER v. SMITH.

The testator died on June 26, 1897, when the term on which the leaseholds were held was reduced to about twenty-nine years. The trustees effected an insurance of the leaseholds, and paid three annual premiums of 50*l.* each in accordance with the directions contained in the will. Various questions arose, and the trustees took out an originating summons for the determination amongst others of the question whether the direction to insure the leaseholds was void to any and what extent under the Thellusson Act, or the rule against perpetuities, or otherwise.

Martelli, for the trustees. It is admitted by all parties that, inasmuch as the fund vests within the proper period, the direction to insure is not void under the rule against perpetuities; nor, we submit, is it void under the Thellusson Act. There is no accumulation; the testator only directs payment of premiums to an office on a contract by which at a certain time it will pay a sum of money to replace wasted property. It is an investment to preserve the capital invested in the leaseholds: *Bassil* v. *Lister*. (1)

[He was stopped by the Court.]

C. Stafford Crossman, for infant defendants.

R. H. Hodge, for other defendants. This is a disposition of personal estate whereby the profits are directed to be accumulated, and the beneficial enjoyment thereof is postponed, within the preamble to the Thellusson Act. Sect. 2 provides for various exceptions, but there is no exception in the Act of a case where accumulation is directed in order to replace loss by wasting.

[BUCKLEY J. referred to *Vine* v. *Raleigh* (2) and *In re Mason*. (3)]

Those cases have never been applied to leaseholds. In the observations on *Bassil* v. *Lister* (1), at p. 286 of Jarman on Wills, 5th ed., the correctness of that decision is doubted.

BUCKLEY J. stated the facts, and continued:—The question I have to determine is whether the direction in the will to

(1) (1851) 9 Hare, 177. (2) [1891] 2 Ch. 13.
(3) [1891] 3 Ch. 467.

apply a yearly sum for a period which exceeds twenty-one years from the death of the testator is void to any and what extent under the Thellusson Act. In my judgment it is not. The language of the preamble to the Act is as follows: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained." It is then enacted by s. 1 that "No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated" for more than a certain time.

What the testator has here directed is not, in my opinion, an accumulation within the Act. All that he has done is to direct that the property shall not be diminished. At the end of the term the leaseholds will be gone, and his scheme is that the money shall be there to replace them. Therefore, on principle, I do not think that this is an accumulation.

On the authorities I come to the same conclusion. There is a decision of *Bassil* v. *Lister* (1), where the policy was not to be effected by the trustees, but had been effected by the testator himself. The Vice-Chancellor says (2): "The dry question I propose to determine is, whether a direction given by a will, to pay out of the income of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid, for the whole of the life insured, or only for the term of twenty-one years after the death of the testator." He answers the question by finding that it is valid for the whole of the life insured. He explains the origin of the Thellusson Act, and says this (3): "It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is

(1) 9 Hare, 177. (2) 9 Hare, 180.
(3) 9 Hare, 183.

BUCKLEY J. 1901 GARDINER, *In re.* GARDINER v. SMITH.

not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to shew that it is not; and I think that the language of the enactment confirms that view." That was a stronger case than the present, because there the premiums paid after the death of the testator did produce a sum on the dropping of the life, and that sum might be regarded as an accumulation. The Vice-Chancellor decided that it was not an accumulation, and if that was not an accumulation then a fortiori this is not, for the trustees here do not pay premiums so as to get an increase: they simply put them together in a heap so as to have the same and not an increased property at the end of the term. In my opinion *Bassil* v. *Lister* (1) goes further than I am asked to go in this case. Then there are the decisions in *Vine* v. *Raleigh* (2) and *In re Mason* (3) to the effect that a trust to apply rents in repairing and reinstating buildings is not within the Thellusson Act. Repairing is putting property into as good a state of repair as it formerly was. In *Vine* v. *Raleigh* (2) the Appeal Court drew a distinction between repairing old houses and putting up new houses, and held that repairs were outside the Act. Lindley L.J. says (4): "All improvements in substance, which can in any fair sense be regarded as coming under the words 'maintaining in good habitable repair houses and tenements,' appear to be outside the Thellusson Act altogether." Why? I understand him to mean because they simply keep up the property and do not add to it: an improvement which adds to the property is within the Act, but an improvement which only keeps up the property is outside the Act. The decision in *In re Mason* (3) is to the same effect. Stirling J. there held that a trust for applying rents and profits in payment of ground rents and keeping buildings insured against fire and in tenantable repair and investing the surplus was valid so far as it was a bonâ fide provision for the performance of the trusts for rebuilding, repairing, and reinstating the buildings. Applying the principle

(1) 9 Hare, 177.
(2) [1891] 2 Ch. 13.
(3) [1891] 3 Ch. 467.
(4) [1891] 2 Ch. 26.

of these cases to the present case, it appears to me that this so-called accumulation being one which simply keeps up the property to its present value is valid and is not within the Thellusson Act.

Solicitors: *Gardiner & Son; W. Hicks.*

H. C. R.

In re MORRISON. MORRISON *v.* MORRISON.

[1900 M. 2160.]

Will—Partnership—Conversion into Company—Exchange of Testator's Interest in the Business for Shares in the Company—Agreement by Executors—Jurisdiction to sanction.

The Court has no jurisdiction to sanction an agreement by which executors and trustees propose to concur in converting into a limited company a business in which their testator was a partner, where, by the terms of the agreement, the testator's share in the business will be exchanged for shares and debentures which the executors and trustees are not authorized by the will to hold.

MARTIN MORRISON by his will devised and bequeathed all his real and personal estate not thereby otherwise disposed of to trustees, upon trust to sell, call in, and convert into money the same or such part thereof as should not consist of money, and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and invest the residue, and stand possessed of the residuary trust moneys, upon trust to pay annuities to his widow and children and sister-in-law, with remainder to his children. The will contained the following provisions: "My trustees shall at the request of my wife carry on, or permit my wife to carry on so long as she may think proper, the farming operations carried on by me at the time of my decease, without being answerable for any loss occasioned thereby for a period of twelve calendar months from the 6th of April next after my death, and may postpone the sale and conversion of my real and personal estate or any part thereof

BUCKLEY J. 1901 MORRISON, *In re.* MORRISON *v.* MORRISON.

(except such part of my personal estate as may at the time of my death consist of the stock or shares of any unlimited company which I direct my trustees to sell as soon as possible after my death) for so long as they shall think fit. And as to my share in the Manvers Main Colliery Company, Limited, and Houghton Main Colliery Company, Limited, I hereby express my desire, without intending hereby to control the discretion of my trustees, that they shall continue to hold the same unsold and unconverted." The testator gave directions as to the income of the unsold part of his estate, and continued as follows: "In addition to the securities authorized by the Trustee Act, 1893, or any statutory modification thereof, my trustees may continue to hold my present investments so long as they think fit, and may lay out the trust funds in the purchase of freehold and copyhold estates in England and Wales." The will contained no reference to an ironmaster's business called the Renishaw Iron Company, a fourth share in which belonged to the testator.

The testator died on February 1, 1900, leaving a widow and six infant children. The net value of his real and personal estate was sworn at 130,029*l.* 16*s.* 11*d.* The total value of property settled and unsettled passing on his death to his wife and family was 148,887*l.* 3*s.* 7*d.* The book value of his share in the Renishaw Iron Company was 13,374*l.* 2*s.* 8*d.*

Shortly before the death of the testator arrangements had been made between his partners and himself for the sale of the assets and business of the Renishaw Iron Company to a limited company to be incorporated for that purpose, and an agreement of sale had been prepared, but had not been actually executed by the testator.

On July 18, 1900, the executors executed an agreement between the testator's partners, themselves, and a trustee for the intended company for the sale of the partnership assets and business to the company for 40,000 fully paid shares of 1*l.* each and 20,000*l.* 5 per cent. mortgage debenture stock, being the whole amount of the issue of such stock. This agreement was substantially the same as that prepared for the testator's signature, with the necessary modifications caused by his

death. The testator's share of the proceeds of sale was 10,000 fully paid shares of 1*l.* each and 5000*l.* debenture stock.

The executors took out a summons asking that the agreement might be approved by the Court as a proper agreement for them to enter into, and that they might be authorized to hold the shares and debenture stock of the company coming to them under the agreement for so long as they should think fit, as if the same had formed part of the estate of the testator.

Ingpen, K.C., and *Fischer Williams*, for the plaintiffs. The sanction of the Court is asked to the proposed agreement, which will be most beneficial to all the parties interested. A forced sale of the business would cause great loss. The shares in the company are not an investment authorized by the testator, and the trustees have no power to carry out the arrangement; but the Court has often sanctioned similar schemes: Palmer's Company Precedents, 7th ed. Pt. I. pp. 606–613, where amongst others the orders are given which were made in *Lord* v. *Seddon* (1) by Stirling J., August 4, 1890; *In re Sir Titus Salt, Bart., deceased, Salt* v. *Wright* (2), by Jessel M.R., July 27, 1881; and *Boyce* v. *Bullard* (3), by Stirling J., March 25, 1895. Similar orders were made by Chitty J. in *In re Holroyd, Holroyd* v. *Holroyd* (4), July 26, 1887, and by North J. in *In re Bland, Bland Garland* v. *Bland* (5), December 19, 1891. The Court has jurisdiction to approve such schemes in the general administration of the estate. The only decision to the contrary is *Re Crawshay* (6), but in that case the will contained an express direction to carry on the business. There is no reported case which gives the grounds on which any judge has given his sanction. The principle, however, is that if no order is made the business must be sold, and it is done to avoid loss. It can also be approved on the ground that it is a compromise of disputes between the trustees and the surviving partners: *West of England and South Wales District Bank* v. *Murch.* (7) It is

(1) Not reported.
(2) Not reported.
(3) Not reported.
(4) Not reported.
(5) Not reported.
(6) (1888) 60 L. T. 357.
(7) (1883) 23 Ch. D. 138.

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important that the estate should be relieved from the liabilities of the business. The agreement is only a step in the realization of the assets, and the best proof of the existence of jurisdiction is the fact that it has been so frequently exercised.

H. Charlton Hawkins, for the beneficiaries. It is clearly for the benefit of the infants interested that this scheme should be carried out. The Court has jurisdiction to approve of it under the implied power conferred by the will to carry on the business. There is power to postpone the sale of any part of the estate which does not consist of shares in an unlimited company. A share in a business is not a share in an unlimited company; so there is power to postpone a sale of this business. Therefore the trustees can carry on the business: *In re Crowther* (1); and all that they propose to do now is to change their unlimited liability whilst thus engaged into limited liability.

BUCKLEY J. stated the facts, and continued:—In my opinion I have not jurisdiction to approve the agreement. In substance it amounts to one of two things: either it is a sale and an investment of the proceeds in unauthorized securities, or it is an exchange of property of the testator for other property which the trustees are not authorized to hold. Thus stated, it would seem plain that there is no power in the trustees to do it; and no power in the Court in the administration of the estate to do that which, if done by the trustees, would be a breach of trust. It is said that many such orders have been made in chambers. I recollect very well the most prominent instance, that of *In re Sir Titus Salt, Bart., deceased, Salt* v. *Wright* (2), in 1881. It was a most exceptional case. There were a great number of legacies of very large amount, and the magnitude and nature of the property was such that it was impossible to realize the assets for cash. I well remember what Sir George Jessel said in making the order in chambers, but I will not repeat it. There have been other unreported cases in which similar orders have been made, but they have all, I think, been what might be called benevolent orders, made to help the parties. There are two reported cases. The

(1) [1895] 2 Ch. 56. (2) Not reported.

first is *West of England and South Wales District Bank* v. *Murch* (1), in which Fry J. found his way to sanction such an agreement in these circumstances. The testator was a partner in a firm which was largely indebted to a bank and other creditors; the arrangement was one by which his widow (who was his trustee and executrix) and the surviving partner concurred in a sale of the partnership property to a limited company. The purchase-money was to be paid partly in cash and partly in fully paid-up shares and debentures of the company, which were to be handed over to the bank in satisfaction of their debt. The bank were to pay all the other creditors of the firm, and to hand back to the executrix a sum of cash and some of the debentures, and to provide certain benefits for the surviving partner. So the widow was to get some debentures. Upon a subsequent sale made by the company the purchaser raised the question whether the widow had power to sell the property for a consideration not entirely paid in money. Fry J. decided the case under s. 30 of Lord Cranworth's Act as being a compromise made by the executrix with the creditors of the firm. He says this (2): "As executrix, acting under Lord Cranworth's Act, she had power to compromise the claim of the bank. It appears to me that the effect of what she did was, in consideration of the conveyance of these partnership assets, to obtain certain other property with which she entered into a compromise with the bank. The other aspect of the transaction is the arrangement into which she entered with Mr. Thomas William Booker" (her husband's partner). "It is said that that arrangement gave unequal benefits to the two partners. That is perfectly true. It is said that it must be presumed that their interests in the partnership were equal. I know not why such a presumption should be made by the Court. I have no doubt that there were unsettled partnership accounts which must have been taken between Mrs. Booker and Mr. Thomas William Booker if she had not entered into this compromise with him. Under Lord Cranworth's Act she had power to compromise, and by the arrangement into which she then entered, she did compromise any questions between

(1) 23 Ch. D. 138. (2) 23 Ch. D. 151.

BUCKLEY J.
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MORRISON, *In re.* MORRISON *v.* MORRISON.

herself and Mr. T. W. Booker I regard the transactions as in substance a compromise by the executrix with the bank and with her deceased husband's co-partner."

The other case is a decision of North J. in *Re Crawshay* (1), in which *West of England and South Wales District Bank* v. *Murch* (2) was cited and relied upon. That was a case in which the testator gave an annuity to his wife and legacies to trustees for the benefit of his seven daughters and their husbands and children, and he bequeathed one moiety of his share of the businesses carried on by him in partnership with his two eldest sons to trustees upon trust for his youngest son, and he devised and bequeathed the residue of his real and personal estate to his two eldest sons in equal moieties, and he authorized his trustees to postpone the realization of his estate and to carry on and manage any trades or businesses in which he might be engaged at his death for so long as they should think fit. He settled his daughters' shares and authorized the trustees to sell any part of his residuary trust estate. The facts were that the debts and legacies exhausted the testator's estate other than his business; and a proposal was made for the formation of a limited company to which the business should be sold for a price to be paid in shares and debentures of the company, and that these should be allocated in satisfaction of their legacies amongst the persons interested in the property. Petitions were presented for the sanction of the Court to this scheme, and North J. said (3): "Two questions arise upon the application: first, as to whether the Court has jurisdiction to do what it is asked to do; and secondly, if so, whether what is asked for is likely to be beneficial for the parties interested. I am told there is strong evidence on the second point; but I think I have no jurisdiction to sanction the scheme, and the question whether it would be beneficial or not does not really arise." He states the provisions of the will, and the scheme for a sale to a company and the division of the shares amongst the members of the family, and continues: "I cannot look upon that as a sale to a going company, because what is proposed is

(1) 60 L. T. 357. (2) 23 Ch. D. 138.
(3) 60 L. T. 359.

something more than that. It may be true that the interests to be given to the legatees may be capable of being offered for sale; but it is clear that what is done by the scheme is really to substitute for legacies and other interests in the testator's estate, interests in the company proposed to be formed. What the testator provides for is a sale of one half of his moiety of the business, and he did not contemplate it being retained in specie. Mr. Everitt says the powers given to the trustees by the will are very large. I think they are large, but not large enough to authorize the scheme now proposed. I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will. On the assumption that the scheme would be beneficial to the estate, I cannot decide that I have jurisdiction to authorize it."

I feel myself exactly in the position of North J. I have not heard the evidence, but I assume that the proposed arrangement is expedient and beneficial. I have not however found, and counsel have not found, any authority to shew that I have jurisdiction to make the order, and upon the authority of the decision before North J. I have none. As to the cases cited from Mr. Palmer's book, it does not appear what were the trusts under which the property was held. In my opinion there does not reside in this Court any power to authorize trustees to take, on the ground that it is beneficial, an investment which the testator has not authorized. I must therefore refuse the application. Having regard to the state of the authorities, I think the application was not an unreasonable one, and the costs of all parties will come out of the estate.

Solicitors: *Tarry, Sherlock & King, for Trotter, Bruce & Trotter, Bishop Auckland.*

H. C. R.

BUCKLEY J.

1901

March 6.

In re PARES.
In re SCOTT CHAD.
SCOTT CHAD *v.* PARES.

[1901 P. 277.]

Husband and Wife—Settlement—Covenant to settle after-acquired Property— 500*l. or upwards—Legacies—Deduction of Duty—Time and Source of Payment.*

A legacy of 500*l.*, which by payment of duty at 10 per cent. has been reduced to 450*l.*, is not within a covenant to settle any after-acquired property of the value of 500*l.* or upwards.

A legacy out of general estate given by a codicil to a will, and a legacy given by another codicil to the same will out of the proceeds of sale of real estate which has not yet been sold, are acquired at one and the same time, namely, the death of the testatrix, and from one and the same source, namely, the testatrix. They must therefore be added together and treated as one sum for the purpose of a covenant to settle any property to which a married woman should become entitled "at one and the same time and from one and the same source."

SUMMONS to determine (inter alia) whether any, and if so which, of the benefits given to the plaintiff Alice Scott Chad by the will and codicils of Eliza Back were bound by the covenant to settle the after-acquired property of the plaintiff contained in her marriage settlement.

By the settlement Mrs. Scott Chad (then Alice Pares) covenanted that "if at any time during the continuance of the said intended marriage the said Alice Pares shall at one and the same time and from one and the same source become either by gift or will or otherwise howsoever seised or possessed of or entitled to any real or personal property of the value of 500*l.* or upwards," the same should be settled.

By her will dated November 5, 1896, Eliza Back devised and bequeathed all her real and personal property to trustees. By a codicil of the same date she directed her trustees to pay out of her real and personal estate to each of the children of Katherine Pares (Mrs. Scott Chad's mother) who should be living at her death 500*l.* By a second codicil dated May 12,

1899, the testatrix directed that certain lands in the parish of Horsell should be sold as soon as possible after her death, and out of the proceeds she gave, amongst other legacies, a legacy to Mrs. Scott Chad of 500*l.*, in addition to the legacy given by the first codicil. The testatrix died on June 17, 1900. The legacies given to Mrs. Scott Chad were subject to duty at the rate of 10 per cent., and were thus reduced to 450*l.* each. The land at Horsell had not yet been sold.

Austen-Cartmell, for the plaintiff. These two legacies of 500*l.* each are different sums, and neither of them is caught by the covenant to settle after-acquired property. Legacy duty has to be paid before the legacy itself can be paid; therefore the legatee only receives the legacy less the amount paid for duty. In this case Mrs. Scott Chad receives two different sums, each of which is below the limit of 500*l.* fixed by the covenant.

She does not receive them at one and the same time and from one and the same source, so as to make it necessary to add them together and thus form a sum of 900*l.*, which would be within the covenant. First, she does not receive them at the same time. The first legacy is payable at once out of the general estate; the second is not payable till the Horsell property is sold. Secondly, she does not receive the legacies from the same source. "Source" is equivalent to "title," and it has been held that a legacy and a share of residuary estate given by the same will are derived under different titles: *In re Middleton's Will* (1) and *In re Davies*. (2) The testatrix is not the source. The source of the first legacy is the general estate; the source of the second legacy is the Horsell property. The testatrix owned both sources of property, but was not herself the source.

M. Romer, for the defendants, was not called upon to argue.

BUCKLEY J. stated the facts, and proceeded:—The legatee in each case has to suffer a deduction of duty at the rate of 10 per cent., so that each of these sums becomes, as far as her beneficial receipt of it is concerned, 450*l.* only, and is therefore not caught

(1) (1868) 16 W. R. 1107. (2) [1897] 2 Ch. 204.

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PARES, *In re.* SCOTT CHAD, *In re.* SCOTT CHAD *v.* PARES.

by the covenant. The aggregate of these two sums is 900*l.*, and the question is whether they ought to be thus aggregated, and whether they ought therefore to be settled. In my opinion they ought. Did the lady become by will entitled "at one and the same time" to both these legacies? Plainly she did. At what time? When the testatrix died. There is only one period of time. Did she get them "from one and the same source"? I answer, She did. The source from which she became by will entitled was the testatrix. It has been argued that she acquired one sum by a legacy out of the general estate and the other out of the proceeds of sale of land, and that these are different sources. In my opinion "source" does not mean that. If a testatrix entitled to a balance at the London and Westminster Bank and to a balance at the Capital and Counties Bank, gives both to one legatee, it appears to me that the legatee becomes entitled to both sums from a source which is not the banks, but the testatrix. In my opinion, therefore, the lady became entitled "at one and the same time and from one and the same source" to both these legacies, and they must be treated as one for the purpose of the covenant.

Does it make any difference that one sum is not immediately payable because the land out of the proceeds of which it is payable has not yet been sold? I answer, No. The time to be considered is the moment when she became entitled to this legacy. That was when the testatrix died, although she would not actually receive it till later. When she thus became entitled to it, she could have sold the right to receive in the future payment out of the land. The aggregate value of the two legacies would thus be more than 500*l.*, for she could get value at once to the amount at least of 500*l.* I hold, therefore, that the property derived under the will is bound by the covenant.

Solicitors: *Bower, Cotton & Bower.*

H. C. R.

COLES *v.* COLES.

JOYCE J.

1901

Feb. 5.

[1899 C. 4216.]

Marriage Settlement—Construction—Assignment of Future Property—Gift from Husband.

An assignment by the intended wife in a marriage settlement of her property and fortune, both present and expectant or future, *held* not to comprise a sum of money which the husband made a present of to the wife long afterwards.

By a settlement dated July 5, 1856, and made in contemplation of the marriage of Thomas Edgehill Coles and Anne Elizabeth Britten, after reciting that the several parties thereto had agreed "that the said A. E. Britten should convey assign and assure all and singular her property and fortune whatsoever both present or expectant and future vested and contingent" to the trustee of the settlement upon the trusts thereinafter declared, it was witnessed that the said A. E. Britten did thereby "grant release convey assign transfer and set over" unto the said trustee, his heirs, executors, administrators, and assigns, "all and singular the property and fortune whatsoever both present and expectant or future vested or contingent of her the said A. E. Britten," to hold the same upon the trusts thereinafter declared; and it was declared that the trustee should stand possessed of the property upon trust for the said A. E. Britten for life for her separate use, and after her decease, upon trust for the children of the marriage as she should appoint, and in default of appointment, upon trust for all the children "and the heirs of their respective bodies in equal shares as tenants in common," and in default of issue, in trust for the said A. E. Britten, her heirs, executors, administrators, and assigns, absolutely.

The wife had died, and her husband was her legal personal representative.

In an action brought by the sole surviving child of the marriage against the husband, the existing trustees of the

JOYCE J. 1901 COLES v. COLES.

settlement, and the legal personal representative of a deceased child, for an account of the property comprised in the settlement, the question was raised whether a gift by the husband to the wife during coverture of a sum of 280*l.* was included in the settlement.

Frederic Thompson (*Younger*, *K.C.*, with him), for the plaintiff. In this settlement the words "and" and "or" appear to be used interchangeably, and not much importance can be attached to them. The word "future" in this assignment is more remote than "expectant," and includes any property, whether real or personal, to which the wife becomes entitled at any time after the settlement. It has never been doubted that future property may be assigned by apt words, but as to future property, this assignment operates as a covenant: *Tailby* v. *Official Receiver*. (1) If this assignment extends to after-acquired property, it certainly covers all gifts of corpus acquired during the coverture from whatever source. No distinction can be drawn from the fact that the property is derived from the husband.

Hughes, *K.C.*, and *G. F. Hart*, for the husband. This settlement refers only to property to which the wife at the time of the coverture had some sort of title, present or expectant or future, vested or contingent, and that is all that she could in any proper sense assign. "Expectant" and "future" are used here as synonymous terms.

There is no authority for reading a present assignment in a marriage settlement as a covenant to settle after-acquired property, at any rate, where the assignment can be satisfied by referring it to present property.

Assuming that this is a covenant to settle after-acquired property, it does not include this gift. The primary object of the covenant is to preserve the wife's property from the husband, and it would be strange if it applied to a gift by the husband to the wife. *Dickinson* v. *Dillwyn* (2) and *Carter* v. *Carter* (3) shew that a covenant to settle the wife's after-acquired pro-

(1) (1888) 13 App. Cas. 523. (2) (1869) L. R. 8 Eq. 546.
(3) (1869) L. R. 8 Eq. 551.

perty does not include property coming to the wife under the husband's will, and in the former case Malins V.-C. expressly states his opinion that the covenant does not apply to any property coming to the wife from the husband. Those cases were followed and approved by the Court of Appeal after consultation with the Lord Chancellor in *In re Edwards* (1), though the dictum of Malins V.-C. was not there discussed. The importance of those decisions is that restrictions will be put upon the generality of the language having regard to the object of the covenant.

Hamilton, K.C., and *Ashton Cross*, for the trustees of the settlement.

Charles Bathurst, for the legal personal representative of a deceased child.

Thompson, in reply.

JOYCE J. This case raises a question of some difficulty. It is whether a sum of 280*l.* given to the deceased lady by her husband is bound by the settlement made on her marriage. That settlement was very inaccurately and loosely framed. The words in the recital do not agree with the words in the operative part. [His Lordship read the operative words, and continued:—]

There is no express clause for the settlement of after-acquired property; and if the sum in question is bound by the settlement it is bound by way of contract only, under the assignment of all the lady's property "both present and expectant or future vested or contingent." Other parts of the settlement also are inaccurate; for example, the limitation to the heirs of the body of the children, that being apparently intended to include personalty as well as realty. Upon the document itself it appears to me to be extremely doubtful whether it was intended to be an assignment of anything in which the lady had not at the time of the settlement some estate or interest. If it have a more extended meaning, it is clear that some limitation must be put upon it, because it could not be held to include property

(1) (1873) L. R. 9 Ch. 97.

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coming to the lady after the termination of the coverture, and in my opinion it could not be held to include income, notwithstanding that the words are wide enough to include both.

The result is that I think it doubtful whether this assignment was intended to include after-acquired property; but I decide this case upon the grounds stated by Malins V.-C. in his judgment in *Dickinson* v. *Dillwyn* (1), where he says: "On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband." What I mean is this: that in my own mind, rightly or wrongly, I have no doubt that if I were to make this assignment extend to this sum of money I should be doing what the parties never intended or for a moment thought of. I therefore hold that this sum of money is not bound by the settlement.

Solicitors: *H. J. & T. Child; Bentwich, Watkin-Williams & Gray; Sydney James; Ward, Bowie & Co.*

(1) L. R. 8 Eq. 551.

H. B. H.

In re ROGERSON. BIRD *v.* LEE.

JOYCE J.
1901
Feb. 13, 16.

[1900 R. 1713.]

Will—Gift to Charity—Invalid Bequest followed by Gift of Residue to Charity.

Testator by his will, dated in 1864, gave the sum of 1000*l.* out of his personal estate to trustees, and directed that it should be invested in the names of the vicar and churchwardens of a certain church, upon trust in the first place out of the income to maintain yearly and keep in good repair and condition a tomb belonging to the testator in the churchyard, and in the next place to divide and distribute the remainder among the poor recipients of certain almshouses :—

Held, that, the gift to maintain the tomb being invalid, the whole income of the fund went to the vicar and churchwardens on behalf of the almshouses.

Fisk v. *Attorney-General*, (1867) L. R. 4 Eq. 521, *Dawson* v. *Small*, (1874) L. R. 18 Eq. 114, and *In re Birkett*, (1878) 9 Ch. D. 576, followed.

John Rogerson by his will dated October 26, 1864, after directing payment of his debts, funeral and testamentary expenses, subject thereto gave all his personal estate and effects, except the sum of 1000*l.* thereinafter mentioned, to his wife Margaret Rogerson for her own absolute use and benefit. The testator then gave all his real estate, and the said sum of 1000*l.* reserved out of his personal estate, to W. H. Palmer, J. R. M. Sawyer, and G. Crawshaw, upon trust to permit his wife to receive the rents and income arising therefrom and during her life, and after her decease, as to a portion of his real estate, upon certain trusts therein mentioned, and as to the residue of his real estate and the said sum of 1000*l.* upon trust to pay certain legacies, including a legacy of 100*l.* to each of five charitable institutions therein named, and as to the said sum of 1000*l.*, the testator directed that it should be invested in the purchase of 3*l.* per cent. Consolidated Bank Annuities in the names of the vicar and churchwardens of St. George's Church, Doncaster, " in trust that they the said vicar and churchwardens for the time being do and shall out of the proceeds or annual income of such investments in the first place maintain yearly and keep in good repair and condition annually in all respects

JOYCE J. 1901 ROGERSON, *In re.* BIRD *v.* LEE.

the two tombs and palisading belonging to me, and also the gravestone belonging to Miss Rogerson and adjoining mine in the cemetery. One tomb is situated in the graveyard of St. George's Church and the other in the Doncaster Cemetery; and in the next place to divide and distribute the remainder of such annual income or dividend unto and equally among the poor recipients of the four Stock Almshouses and of the recipients of the two adjoining and attached houses built by the Mayor in the year 1861 and 1862 or thereabouts situate in the Holmes in Doncaster." And the testator directed that his trustees should have full power and authority, and he thereby directed them to see that the money was properly applied yearly "for the purposes aforesaid." He gave all the residue of his real estate and effects whatsoever to W. H. Palmer and J. R. M. Sawyer in equal shares for their own absolute use and benefit. He appointed his wife sole executrix of his will during her life, and the said W. H. Palmer, J. R. M. Sawyer, and G. Crawshaw to be joint executors thereof after her death.

The testator died on November 14, 1864, and his will was proved by his widow.

George Crawshaw renounced the trusts of the will.

J. R. M. Sawyer died on January 22, 1889, and the plaintiffs were his legal personal representatives.

W. H. Palmer, the surviving trustee, died on March 3, 1899, and the defendants Lee and May were his legal personal representatives.

The testator's widow died on June 17, 1900.

This was a summons taken out by the plaintiffs for the determination (inter alia) of the following questions: (1.) Whether the legacies to the five charitable institutions were or were not void; and (2.) what was the effect of the disposition of the 1000*l.*

His Lordship held upon the first question that the legacies were void as being given out of land, and that, subject to the second question, the sum of 1000*l.* went to the vicar and churchwardens.

Hughes, *K.C.*, and the *Hon. T. H. Watson*, for the plaintiffs. The gift to maintain the tombstones is invalid, and so much o

the 1000*l.* as would have been required for that purpose falls into residue, the surplus being no doubt well given to the vicar and churchwardens for the benefit of the almshouses: *Hoare* v. *Osborne* (1); *In re Rigley's Trusts* (2); *In re Vaughan.* (3)

This comes within the class of cases where the donor has in effect divided the fund into two parts, and given one part for an invalid purpose, and the other to charity. The amount required to satisfy the illegal purpose is here reasonably ascertainable and falls into residue, the gift of the other part to charity being good: Tudor's Charitable Trusts, 3rd ed. p. 43. It is true that authority may be cited against this view: *Fisk* v. *Attorney-General* (4); *Hunter* v. *Bullock* (5); *Dawson* v. *Small* (6); *In re Williams.* (7) But in *In re Birkett* (8) Jessel M.R. reluctantly followed that line of authorities. Here there is a sufficient distinction between the two objects, and the gift to one being valid takes effect, while the other being invalid fails.

The testator directs his trustees to see that the income of the fund is properly applied "for the purposes aforesaid." It cannot be said that the whole is to be applied for the second purpose, ignoring the first.

Hamilton, K.C., and *C. James*, for the five charitable institutions. We support the same contention, but we submit that so much of the 1000*l.* as would have been required for the invalid gift to maintain the tombstones does not fall into residue, but becomes available for the charities we represent. We further rely upon *Fowler* v. *Fowler* (9) and *Re Taylor* (10), where Kay J. commented upon *Fisk* v. *Attorney-General.* (4) This case is not within *Fisk* v. *Attorney-General.* (4) Here it is not the residue which is given to charity, but the words are, "and in the next place to divide and distribute the remainder of such annual income"—that is to say, such part of the annual income as is not required for the first-named object.

J. G. Wood, for the vicar and churchwardens. There is no

(1) (1866) L. R. 1 Eq. 585.
(2) (1866) 36 L. J. (Ch.) 147.
(3) (1886) 33 Ch. D. 187.
(4) L. R. 4 Eq. 521.
(5) (1872) L. R. 14 Eq. 45.
(6) L. R. 18 Eq. 114.
(7) (1877) 5 Ch. D. 735.
(8) 9 Ch. D. 576.
(9) (1864) 33 Beav. 616.
(10) (1888) 58 L. T. 538.

JOYCE J. 1901 ROGERSON. *In re.* BIRD *v.* LEE.

distinction between the words "surplus," "residue," and "remainder" for this purpose. The whole fund is well given in favour of the almshouses: *Dawson* v. *Small.* (1) The authorities may be divided into two classes: (1.) Where there is a gift of a fund to be applied in the first place to a particular object, with a gift over of the surplus to charity. If the gift to the particular object fails, the gift of the surplus takes effect on the whole. (2.) Where there are two or more objects standing pari passu, as, for instance, where the donor has divided a fund into two parts, and given one part for an invalid purpose, and the other part to charity. In these cases it has been held that there is no gift to charity of the part intended to be devoted to the invalid purpose. This latter class of cases is illustrated by *In re Vaughan* (2), which clearly shews the distinction between the two classes. The present case falls within the former class. *Fowler* v. *Fowler* (3) was decided at a time when the law was not so well settled as it has since become.

Eastwick, for the defendants Lee and May.

JOYCE J. I think that the law on this question is correctly stated on p. 45 of Tudor's Charitable Trusts, in the passage which says that in all cases where "a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes . . . . it has been held that the result of the failure of the trust for the repair of the tomb is, that the whole of the income becomes applicable for the charitable purpose." Now, of course, in all these cases the real question is whether on the true construction of the gift the trust for the application of the income for the repair of the tomb is to be a charge on the whole income, and the residue is to be given to the charitable purpose. By "residue" I mean so much of the income as is not required for the repair of the tomb. In this particular gift the word "residue" is not used; the words are, "do and shall out of the proceeds or annual income of such investment in the first place maintain yearly and keep in good repair and

(1) L. R. 18 Eq. 114. (2) 33 Ch. D. 187. (3) 33 Beav. 616.

condition annually in all respects the two tombs . . . . and in the next place to divide and distribute the remainder of such annual income or dividend unto and equally among the poor, &c." That to my mind is equivalent to making the provision for the tomb a charge on the bequest. I think that there is no practical difference between the gift in this case and the gift in *Fisk* v. *Attorney-General* (1), and I think that this case is governed by the decision in that case, and *In re Birkett* (2) and *In re Vaughan.* (3) If there be any contradiction between the cases, I think that there is a preponderance of authority in favour of the view adopted in *Fisk* v. *Attorney-General* (1) and the other cases I have mentioned, and I think that the statement to which I have referred in Tudor's Charitable Trusts is right.

Of course, if there were provisions for various objects, and it were possible as a matter of construction to arrive at the conclusion that the testator never intended that there should be any surplus at all, that would be a different matter. Where, however, there is a trust for a tomb, as here, then, as Bacon V.-C. pointed out in *Dawson* v. *Small* (4)—a similar case—"the obligation to keep up the tombstones is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned in favour of these poor people is by no means honorary; it is a trust that must be executed." Testators who make bequests of this nature, if they know the law, really mean the legacy to go to the objects of the charitable bequest with a moral obligation to keep up the tomb. I therefore hold that the whole income of this bequest goes to the vicar and churchwardens of St. George's, Doncaster. The fund must be invested in the name of the official trustees of charitable funds, who will from time to time remit the income to the vicar and churchwardens for the purposes of the charitable bequest.

Solicitors: *Collyer-Bristow & Co.; A. F. & R. W. Tweedie, for Atkinson & Sons, Doncaster; Speechly, Mumford & Co.; Lammin & Lodge, for Parkin, Taylor & Parkin, Doncaster.*

(1) L. R. 4 Eq. 521.
(2) 9 Ch. D. 576.
(3) 33 Ch. D. 187.
(4) L. R. 18 Eq. 114, 118.

G. A. S.

JOYCE J.
1901
Feb. 16, 26.

In re YOUMANS' WILL.

[1901 Y. 12.]

Will—Construction—Real Estate—Rule in Shelley's Case.

Testator gave certain freehold estates to trustees upon trust for management and to receive the rents and profits thereof, and after payment of necessary repairs and outgoings to pay thereout to each of his eight first cousins therein named the sum of 60*l.* per annum for their lives and then to pay the residue of such net rents and profits half-yearly to W. D. for his life, and from and after the respective deceases of the annuitants and W. D. upon trust to convey the said freehold estates, together with any accumulations of rents in the hands of the trustees, unto the right heirs of W. D.:—

Held, that the rule in *Shelley's Case*, (1581) 1 Rep. 93 b, applied, and that W. D. was entitled to the property in fee simple subject to the annuities.

PETITION.

R. Youmans by his will dated August 21, 1877, after devising certain real estate as therein mentioned, gave the residue of his freehold, copyhold, and leasehold estates to trustees upon trust to manage the same as they might think proper, and to receive the rents and profits thereof, and after payment of the costs of keeping the then present buildings in repair (but not to erect new ones unless in their discretion they should consider it necessary so to do), and of all other outgoings and expenses, to pay thereout to each of his eight first cousins therein named the sum of 60*l.* per annum for their lives, and then to pay the residue of such net rents and profits half-yearly to William Douglas for his life, and from and immediately after the respective deceases of his said first cousins and the said William Douglas upon trust to convey, surrender, and assign the said freehold, copyhold, and leasehold estates respectively, together with any accumulations of rents in the hands of his said trustees, unto the right heirs of the said William Douglas.

The testator died on October 25, 1877.

In 1895 the Manchester, Sheffield and Lincolnshire Railway Company (now the Great Central Railway Company), in exer-

cise of their compulsory powers, gave notice to the trustees and William Douglas that they required for the purposes of their undertaking certain lands forming part of the testator's residuary real estate.

By an agreement dated May 28, 1895, the trustees and William Douglas agreed to sell to the company the fee simple of the lands in question free from incumbrances for the sum of 1825*l.*

All the annuitants being dead except two, they by an indenture made September 8, 1899, released unto the trustees and William Douglas, their heirs and assigns, the lands comprised in the agreement of May 28, 1895, from their respective annuities and from all claims and demands in respect of the same. One of the annuitants had since died.

The draft conveyance prepared by the solicitors of the railway company provided for the payment of the purchase-money to William Douglas as being absolutely entitled, but the trustees, being advised that they were entitled to receive the money, and that they could not safely consent to its being paid to William Douglas except under the direction of the Court, the company paid the 1825*l.* into court under the Lands Clauses Consolidation Act, 1845.

This was a petition presented by William Douglas, asking for payment out of the fund to himself.

Hughes, K.C., and *Francis Fitzgerald*, for the petitioner. By the will an equitable estate for life, subject to the annuities, is given to William Douglas, followed by the limitation of an estate of inheritance to his right heirs, and, the limitations being all equitable, the rule in *Shelley's Case* (1) applies, and William Douglas is entitled to the property in fee subject to the annuities: *Van Grutten* v. *Foxwell*. (2) The accumulations of rents (if any) are given to the heirs of William Douglas.

Austen-Cartmell, for the trustees. The rule in *Shelley's Case* (1) does not apply. There is no limitation to the heirs of William Douglas until after the deaths of all the annuitants

(1) 1 Rep. 93 b. (2) [1897] A. C. 658.

JOYCE J. 1901 YOUMANS' WILL, *In re.*

and William Douglas. If any of the annuitants should survive William Douglas for more than twenty-one years, the accumulations beyond that period would go to the testator's heir. The testator has given large powers of management to the trustees which may be taken as an intention to settle: *Evans* v. *Evans*. (1)

M. Romer, for the railway company.

Hughes, K.C., in reply.

Cur. adv. vult.

Feb. 26. JOYCE J. (after stating the facts). Under these trusts William Douglas is equitable tenant for life subject to the annuities, and the trust is, after the death of William Douglas and the annuitants, to convey the property with any accumulations of rents in the hands of the trustees unto the right heirs of the said William Douglas. It appears to me, therefore, that by virtue of the rule in *Shelley's Case* (2), and subject to what the effect of the will may be with respect to the period, if any, between the death of William Douglas and that of the present annuitant if surviving him, William Douglas is owner of the equitable fee simple in the property.

There is no express disposition of the surplus rents as they may accrue during the aforesaid period, if any, between the death of the said William Douglas in the lifetime of the surviving annuitant and the death of such annuitant. Nor is there any express direction to accumulate this surplus, but on the death of the surviving annuitant the property, with any accumulations of rents in the hands of the trustees, is to go to the right heirs of the said William Douglas. Now, whatever may be the true view of the effect of the will with reference to these surplus rents, it is clear that they could not be accumulated for more than twenty-one years from the death of William Douglas, and I am of opinion that according to the true construction of this will any surplus rents accruing after the expiration of the before-mentioned period of twenty-one years from the death of William Douglas during the remainder, if any, of the life of the annuitant are not undisposed of, but

(1) [1892] 2 Ch. 173. (2) 1 Rep. 93 b.

would belong to the right heirs of William Douglas, to whom the accumulations (if any be made) are given.

Further, during the before-mentioned period of twenty-one years, in case the surviving annuitant live so long, the Court would not, in my opinion, direct any accumulation of the surplus rents except in so far as such accumulation might be necessary for the reasonable protection and security of the annuity.

In the result, therefore, I think that according to the true construction of this will the right heirs of the said William Douglas are the devisees of the surplus rents from the date of the death of William Douglas, although any of the annuitants should survive him. In other words, I think that in effect, upon and from the death of the said William Douglas, the will gives the property (but subject to the annuities if and so long as subsisting) to the right heirs of the said William Douglas. If I am right in this, it follows (I think) that subject to the subsisting annuity if and so long as it may be subsisting, and, the limitations being all equitable, by virtue of the rule in *Shelley's Case* (1), the property subject to the annuity belongs to William Douglas in fee simple, or rather would belong to him if it had not been taken by the railway company. But the property in question, or the fund in court, has been released from the only subsisting annuity. I hold, therefore, that William Douglas is absolutely and presently entitled to the fund in court, and I make the order for payment out thereof accordingly.

Solicitors for petitioner: *Venn & Woodcock, for Pellatt & Pellatt, Banbury.*

Solicitors for trustees: *Ullithorne, Currey & Jennings, for C. B. Roche, Daventry.*

Solicitors for company: *Cunliffes & Davenport, for Lingards, Manchester.*

(1) 1 Rep. 93 b.

G. A. S.

JOYCE J.
1901
March 8.

BEVAN *v.* WEBB.

[1901 B. 60.]

Partnership—Books and Accounts—Right of Partner to Inspection by Agent—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.

Partnership articles provided that proper books of account should be kept by the managing partners for the time being, and such books, together with all bills, letters, and other writings concerning the partnership, should be kept at the counting-house, and each of the partners should have free access to, and liberty to examine and copy, or take extracts from, any of the books and writings of the partnership at all times:—

Held, that neither under the articles, nor under the general law, had any partner the right to introduce a stranger to examine the books and accounts on his behalf.

MOTION.

The plaintiffs and the defendants were co-partners in the business of brewers carried on by them at Aberbeeg, in the county of Monmouth. The partnership was constituted and its business carried on under articles of partnership dated July 4, 1893.

By art. 7 the defendants were appointed managing partners, and in that capacity had the sole control and management of the business and of all the partnership assets and property.

Art. 16 provided as follows: "Proper books of account shall be kept by the managing partners for the time being in which all transactions relating to the partnership business shall be duly entered, and such books, together with all bills, letters, and other writings which shall from time to time concern the said partnership business, shall be kept at the counting-house of the partnership, and each of the partners shall have free access to, and liberty to examine and copy, or take extracts from, any of the books and writings of the partnership at all reasonable times." In March, 1900, proposals were made and negotiations took place for the purchase by the defendants of the share of the plaintiffs in the partnership business. The plaintiffs desired to have the partnership assets and books inspected on their behalf by a competent valuer, on the ground that the defendants were experts in the trade and conversant with all

the assets and accounts of the partnership, whereas the plaintiffs, one of whom was a clergyman resident in Canada, two others medical men, and another a lady, had taken no part in the affairs of the business, and knew little as to the value of the business or its assets. They accordingly appointed an accountant to make such an inspection on their behalf. The defendants objected to any inspection except by the plaintiffs personally, but were willing that the partnership books should be examined on behalf of the plaintiffs by the auditors of the firm, and that the results obtained from the auditors should be submitted by the plaintiffs to a valuer selected by them. They objected to the inspection by an accountant unconnected with the firm, on the ground that it would be prejudicial to the business by the possible disclosure of details to rivals in trade. The plaintiffs insisted on their right to have the books and accounts inspected by an agent properly appointed by them, and brought this action to enforce that right. They now moved for an injunction to restrain the defendants from preventing or interfering with the examination or investigation, by such accountant or valuer as might be duly appointed for that purpose by the plaintiffs, of the books of account, bills, and other writings kept by the defendants as the managing partners of the partnership business.

Younger, K.C., and *C. Lyttelton Chubb*, for the plaintiffs. Art. 16 is not to be confined to inspection by the partners personally. It is in similar terms to s. 24, sub-s. 9, of the Partnership Act, 1890. That is an enabling clause, and ought not to be narrowly construed. It was contemplated by the articles that some of the partners might be resident abroad; and others are not in a position personally to make an effectual inspection of the books, having no special knowledge of the business. Under these circumstances it is essential that the partners should have the right to inspect by an agent. They are entitled to such a right under the general law.

In *Brown* v. *Perkins* (1) Wigram V.-C. said, in a suit for taking a partnership account between solicitors, "The partners

(1) (1843) 2 Hare, 540, 541.

JOYCE J. 1901 BEVAN v. WEBB.

themselves, if they had been both living, and the question of account had arisen between them, would both have been entitled to see the papers which are part of the materials for taking the account; and it must, I think, follow that either of the partners might have employed a competent agent for the purpose of examining the papers on his behalf."

In *Dadswell* v. *Jacobs* (1) the right of a principal to have inspection by an agent was recognised, and we submit that cases of partnership are governed by the same principles.

In the appendix to Lindley on Partnership, 6th ed. 794, Notes on Scotch Law, it is stated that it is not the privilege of a partner to introduce a stranger to examine the books, and the authority cited for that proposition is *Cameron* v. *McMurray* (2); but there is no such statement to be found in the English law. Moreover, there are passages in the judgment of Lord Deas in that case which are in favour of our contention. At p. 405 the learned author of Lindley on Partnership says: "It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts."

In Lindley on Company Law, 5th ed. p. 439, dealing with the right of shareholders to inspect accounts, the writer apprehends "that the shareholders of a company are entitled to have its accounts produced at their meetings and to appoint persons to inspect and examine them." See also *Nelson* v. *Anglo-American Land Mortgage Agency Co.* (3)

Art. 16 was intended for the protection of the partners who were unacquainted with the practical details of the business, and if they are not entitled to have inspection by a skilled agent the protection is illusory.

Hughes, K.C., and *G. Cave*, for the defendants, were not called upon.

JOYCE J. This is a novel application, which, I think, must be refused. It is based partly on the general law and partly

(1) (1887) 34 Ch. D. 278. (2) (1855) 17 D. 1142.
(3) [1897] 1 Ch. 131.

upon the partnership articles. If it were the fact that the general law conferred upon every partner the right contended for by the plaintiffs, there would have been before this numerous cases in which it was so laid down, or it would have been found in the code supplied by the Partnership Act, 1890, or in some of the text-books on the subject. But it is not so. No doubt a greater right of inspection exists in cases where there is litigation; and, as I read the decision in *Brown* v. *Perkins* (1), the Vice-Chancellor was there referring only to cases in which there was litigation. Various circumstances, such as the absence beyond seas of a partner, or inexperience in the business, have been urged in favour of a different construction of the partnership articles in this case, but the construction of the articles cannot be affected by any such considerations. I find in art. 16 the provision that each of the partners shall have free access to, and liberty to examine and copy, or take extracts from, the partnership books, but I do not find any such right given as the plaintiffs contend for. If the plaintiffs' contention be well founded, no limitation can be placed upon the right. If they are entitled to send an accountant to inspect the books, they can send a solicitor or any one else. In my opinion no such right exists, and the motion must be refused.

Solicitors: *Andrew, Wood & Purves, for Powell & Hughes, Brynmawr; Le Brasseur & Oakley, for Le Brasseur & Bowen, Newport, Mon.*

(1) 2 Hare, 540, 541.

G. A. S.

WRIGHT J.

1901

Jan. 15.

In re LONDON AND NORTHERN BANK.

McCONNELL'S CLAIM.

Company—Articles of Association—Director—Remuneration fixed by Articles—Resolution of Board to forego—Vacating Office of Director by Absence for Specified Period—Date from which Period runs.

By the articles of association of a company each of its directors was to be paid out of its funds by way of remuneration 300*l.* per annum, and the office of a director was to be vacated if he absented himself from directors' meetings during a period of three calendar months without special leave of absence from the directors. M. was appointed a director on August 3, 1898, and attended meetings of directors down to February 3, 1899, on which last-named date he attended a meeting at which they, including himself, passed a resolution "that no remuneration be received by the directors for their services until a dividend is declared on the ordinary shares of the bank." There was no further meeting from February 3 to March 3, 1899. From February 3 he absented himself without leave until after May 7, 1899, on which another directors' meeting was held, and on May 8, 1899, received a written notice from the board stating that he had ceased to be a director pursuant to the articles, and that the fact of his non-attendance for three months had been ordered to be entered on the minutes. M. did not insist on being reinstated and did not attend a meeting of directors on June 3. The company went into liquidation on December 29, 1899, and no dividend was declared on the ordinary shares. M. claimed to prove for remuneration from the date of his appointment until the winding-up:—

Held, (1.) distinguishing *Lambert* v. *Northern Railway of Buenos Ayres Co.*, (1869) 18 W. R. 180, that, the remuneration not being due until the end of a year, and the agreement to pay it being on February 3 only partially performed and not broken, the resolution was effective; (2.) that the period of absence only began to run from March 3, 1899, terminating on June 3; (3.) that the remuneration was not apportionable, and that the claim of M. failed.

Observations as to when a director absents himself.

THE London and Northern Bank, Limited, was registered under the Companies Acts, 1862 to 1893, in April, 1898, and its articles of association contained the following provisions:—

"91. . . . . The first directors and any director appointed before the ordinary general meeting in 1902 shall hold office until the ordinary general meeting in 1902 subject to the provisions herein contained."

"95. Each of the directors shall be paid out of the funds of

the company by way of remuneration for their services the sum of 300*l.* per annum and such further sums as the company may from time to time determine, and such remuneration shall be divided among them in such proportion and manner as the directors may determine . . . ."

" 97. The office of a director shall ipso facto be vacated . . . . (*e*) if he absents himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors . . . . (*g*) if he is requested by all his co-directors to resign . . . ."

" 172. Every director . . . . shall be indemnified by the company against, and it shall be the duty of the directors out of the funds of the company to pay, all costs, losses, and expenses which any such officer . . . . may become liable to . . . . in any way in the discharge of his duties, including travelling expenses . . . ."

At a meeting of the directors of the bank held on August 3, 1898, Sir Robert John McConnell was appointed one of its directors.

He attended board meetings down to and including a meeting held on February 3, 1899, at which the directors, including himself, passed the following resolution: " That no remuneration be received by the directors for their services until a dividend is declared on the ordinary shares of the bank."

The next meeting of directors was on March 3, 1899, but Sir R. J. McConnell did not attend this meeting. He was absent, without special leave, until after May 7, 1899, having gone to the South of France, according to his custom, to benefit a weak chest. The Court held that this did not absolutely oblige him to go abroad.

On May 8, 1899, shortly after a board meeting had been held, he received a letter of that date from the general manager of the bank, saying: " I am requested by the directors to inform you that you have ceased to be a director of this bank pursuant to clause 97, sub-s. (*e*), of the articles of association, and they have ordered the fact of your non-attendance at any of the directors' meetings during the last three months to be entered upon the minutes."

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The applicant replied to this letter to the effect stated in his Lordship's judgment, but he did not insist on his right to act as a director and did not attend a board meeting held on June 3, 1899.

No dividend was declared on the ordinary shares before December 29, 1899, when the winding-up of the bank commenced.

In the winding-up Sir R. J. McConnell applied for an order that the liquidator should admit his proof as a creditor for 445*l.*—that is to say, 45*l.* for travelling expenses and 400*l.* for remuneration as a director from August 3, 1898, to December 29, 1899, at 300*l.* a year. The claim for travelling expenses was not disputed.

McCall, Q.C., and *T. Douglas*, for the applicant. The resolution of February 3, 1899, does not stand in the way of the applicant's claim. In the first place, it was a mere agreement amongst the directors themselves to postpone their claim for remuneration. It was not a contract with the company, and, there being no consideration for the arrangement, it was a mere nudum pactum, and is no defence to the present application: *Lambert* v. *Northern Railway of Buenos Ayres Co.* (1)

If the applicant is right on this point, he is entitled to remuneration up to the end of three months from the time, if any, when he absented himself. He, however, never did absent himself within the meaning of the articles. He was absent, which is a different thing, for a good reason, that his state of health necessitated his absence.

[WRIGHT J. intimated that the excuse of ill-health was not substantiated by the evidence, and that the applicant had absented himself.]

Assuming that to be the case, there was no absenting of himself until March 3, 1899, and therefore the period of absence only then commenced to run, and in May of that year there had been only an absence of two months.

Tindal Atkinson, Q.C., and *Cairns*, for the liquidator. The

(1) 18 W. R. 180.

agreement among the directors was communicated to the company and its shareholders, and is binding on the applicant. The directors present at the meeting had power to and did bind the company and the applicant. The case cited in favour of the applicant refers only to past consideration, already earned—not to a case of agreeing to vary the terms of a contract only partially performed.

[Wright J. Rescission of a contract before breach was always considered a good plea to an action on it.]

The company could by its directors enter into an agreement with each of its directors that the unperformed agreement as to his remuneration should be varied. Even if the resolution of February 3 was inoperative, the applicant absented himself for three months without special leave, and by the effect of art. 97 (*e*) lost all right to remuneration.

Wright J. I am satisfied that in this case there was nothing which in point of law could be considered as an "involuntary absence" on the part of the applicant. In the construction of an article like clause 97 of the articles of this bank it has been held that the expression "absents himself" means something more than the expression "is absent." In my judgment there was not anything which prevented Sir Robert McConnell from attending the meetings. I come to the conclusion that he physically and medically had an option to attend or not. If he was afraid that it might be injurious to his health to stay in this country, that did not oblige him to go abroad, and under those circumstances, if he preferred his health and preferred to be certain of his health and to go abroad, I do not think it can be said that he was "compulsorily absented." I should say that in circumstances of that kind he absented himself. Still, in my judgment, even though Sir Robert McConnell absented himself, I agree with Mr. McCall that the directors were wrong in acting upon that absence as having vacated his office so soon as May 7. I think the true meaning is what Mr. McCall suggested on that point, namely, that he could not be taken to have absented himself within the meaning of that article until there was a meeting which

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he ought to have attended, and the first meeting after February 3 which he ought to have attended was that which was held on March 3; I do not think that the period of absence began to run until then. Nevertheless, when the three months had elapsed—that is to say, when June 3 had passed—there was a meeting on that day—it seems to me that the applicant had then absented himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors; because when he received the notice that the directors had passed this mistaken resolution he wrote to say that he considered it a breach of faith and so forth, but he did not in any way purport to inform the directors that he should disregard their resolution or insist on acting as a director, or that he should tender himself as being ready and willing to act as a member of the board. There seems to me to be no effectual protest of that kind, and as he did not get the special leave of the directors it seems to me that before his year of office was over he had ipso facto vacated his office.

If so, according to a decision of my brother Cozens-Hardy in *Salton* v. *New Beeston Cycle Co.* (1) which I have followed in more than one instance under an article worded as this article is, there is no room for apportionment or for treating the matter as one of quantum meruit. I am told that Sir Robert McConnell only attended about four out of some fourteen meetings of the directors, and that at any rate he did not make anything like a practice of attending regularly; and it is very difficult to say that where an article directs that each director shall be paid by way of remuneration for his services the sum of 300*l.* per annum, he can be entitled to that rate of remuneration, unless at any rate he serves during substantially the whole of the year, or his attendance is waived by the company. A few casual attendances at meetings might really mean nothing in the work of a director. The principal business of a director very often consists in the determination of matters which only fall to be determined shortly before the annual or semi-annual meetings, and in particular the preparation of balance-sheets, the report to the shareholders, and the state-

(1) [1899] 1 Ch. 775.

ment to them of facts and considerations on which the shareholders are to decide whether a dividend shall be declared or not. If a director retires before that period has arrived, it is as a general rule difficult to say that there is any value in his services. I do not see how any doctrine of quantum meruit can very well be applied. But the great difficulty in the way of Sir Robert McConnell's claim, to my mind, is the resolution passed on February 3. It is contended on his behalf that that cannot be operative to destroy any right Sir Robert McConnell had under the contract by which he became a director of the company. I cannot come to that conclusion, and I do not think that *Lambert* v. *Northern Railway of Buenos Ayres Co.* (1) is an authority to that effect. Certainly it is not a direct authority, for there the plaintiff, who was a shareholder, applied to restrain the company from paying the remuneration which it wanted to pay, and the ground of the decision was that no such bill ought to be entertained. No doubt the learned Vice-Chancellor uses some expressions which are capable of meaning that in a case like this an agreement to waive the remuneration comes to nothing; but I think they were only directed to the case where the remuneration had already been earned. Even then I do not feel clear that the decision is one which ought to be regarded as having the effect which was sought to be attached to it. In the present case on February 3 there was nothing due to the directors, and in my view nothing would be due to the applicant until the end of the year. The agreement between him and the company was still open and unperformed, or at any rate only partially performed, and there had been no breach of it at that time. Under these circumstances I cannot imagine why it was not open to the directors at that time, at a directors' meeting, under the form of this resolution, to make a new contract with the company varying in the aggregate the several contracts which the directors had severally and verbally made by accepting office as directors of the company. It seems to me that it was open to all the directors to agree with each other that they should continue to act on that footing. If this gentleman had

(1) 18 W. R. 180.

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dissented, the other directors might, after reasonable notice in writing, have requested and compelled him to resign by acting under art. 97 (*g*), which provides that the office of a director shall be ipso facto vacated "if he is requested in writing by all his co-directors to resign."

I am doubtful how far the other fact—that this resolution of the directors was communicated to the shareholders, not immediately, but some time early in August—is material, but it is, at any rate, of some weight. Possibly that fact may make a difference. I am not sure that it does; I only mention it to shew that I have not passed it over. I think that evidence might be required of something more than the mere fact of communication, and it is possible that the evidence ought to go to the extent of shewing what would almost be impossible to shew by evidence, namely, that the action of shareholders was in some way influenced by that communication. I doubt whether the mere bare fact that it was communicated to them is enough to alter the case if, apart from the fact of that communication, I am wrong in my decision.

On the whole, I think Sir Robert McConnell cannot maintain his claim in this case except to the undisputed amount of 45*l.* in respect of travelling expenses. I may add that it would be very desirable if those two or three questions, namely, whether salaries of directors are apportionable, whether anything is due until the end of the year, and, if so, on what basis the quantum meruit is and so forth, could be brought before the Court of Appeal.

McCall, Q.C. In *Mack's Claim* (1), after having carefully considered the cases, I came to the conclusion and admitted that I could not argue the point as to whether the remuneration was apportionable—at all events, in a Court of first instance, and that is why I did not venture to argue that point to-day. Whether it would be open to argument in the Court of Appeal is another matter.

Solicitors for applicant: *Nunn, Popham & Starkie.*

Solicitors for liquidator: *Helder, Roberts, Walton & Thomas, for Simpson & Simpson, Leeds.*

(1) W. N. (1900) 114. F. E.

In re RADFORD & BRIGHT, LIMITED (No. 2).

WRIGHT J.

1901

Jan. 18.

[0058 of 1900.]

Company—Winding-up—Committee of Inspection—Creditors unrepresented—Resummoning First Meetings—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9.

In the winding-up of a company by the Court, the Court has power to order the first meetings of the creditors and contributories to be resummoned, and it may limit the purposes of the meetings to the selection of persons to be appointed as members of the committee of inspection.

Where a creditor of a company for a large amount was unrepresented on the committee of inspection, and at a meeting of the creditors, summoned by the direction of the Court, a resolution was passed that it was desirable that the creditor should be represented on the committee, but a majority of the creditors at the meeting expressed the opinion that it was undesirable that any members of the present committee should retire, the Court directed the first meetings to be resummoned to determine whether a committee should be appointed and who should be the members of it.

As reported ante, p. 272, La Société Anonyme l'Industrielle Russo-Belge, a creditor of the company for a large amount (below called "the foreign company"), was not represented on the committee of inspection, and, with a view to remedying this state of things, Wright J. ordered a meeting of the creditors to be summoned, and that the official receiver should act as chairman of the meeting and report the result to the Court.

The meeting of creditors was accordingly convened for the purpose of considering whether the creditors should exercise the power "which they have under s. 9 of the Companies (Winding-up) Act, 1890, of removing any member or members of the committee of inspection, and whether any person or persons should be appointed in the room of any person or persons who may be removed."

The meeting was held on December 19, 1900, the official receiver acting as chairman, and was attended by twelve creditors whose debts had been admitted for, in the aggregate, 56,471*l.* 2*s.* 4*d.*

WRIGHT J.
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The following resolution was carried unanimously: "That it is desirable, having regard to the large interests of La Société Anonyme l'Industrielle Russo-Belge, that they should be represented on the committee of inspection."

A further resolution was proposed and seconded: "That a member of the committee of inspection be removed (such member, in the absence of a resolution to the contrary, to be the member with the smallest interest), and that in his place a representative of La Société Anonyme l'Industrielle Russo-Belge be, and he is hereby appointed, a member of the said committee in the place of the member so removed."

The following amendment of this resolution was, however, passed: "That it is undesirable in the interests of the liquidation that any member of the present committee should retire."

The official receiver having made his report, the matter was again brought before the Court.

Buckmaster, for the foreign company. The meeting of creditors has expressed its opinion that the foreign company ought to be represented on the committee, but that it is undesirable for any member of the present committee to retire. Under the circumstances the only course which suggests itself is to order the first meetings of the creditors and contributories to be summoned in order that they may have the opportunity of appointing a committee of inspection on which the applicant will be represented. There seems to be power under s. 91 of the Companies Act, 1862, to make the order asked for.

Kenyon Parker, for the liquidator. When first meetings are summoned, all they can do is to obey s. 6 of the Companies (Winding-up) Act, 1890, that is to say, determine whether an application shall be made for appointing a liquidator in the place of the committee of inspection, and for the appointment of a committee of inspection to act with him, and who are to be the members of the committee. The first meetings have been held, and the determinations come to at them have been acted on. The determination of new meetings on these points could not be enforced. Moreover, the meetings might not pass identical resolutions, and the whole of the liquidation pro-

ceedings might become abortive. The meetings might select a different person as liquidator.

[WRIGHT J. I should limit the purposes of the meetings to the selection of members of the committee of inspection.]

There is no jurisdiction to limit the operation of s. 6 of the Act of 1890. Perhaps the foreign company would be satisfied if its attorney could attend the meetings of the committee.

WRIGHT J. I think that under s. 91 of the Companies Act, 1862, the Court has an almost unlimited power as to ordering meetings of creditors or contributories to be summoned. If it were not so, it is obvious that in the infinite variety of circumstances that can exist in the winding-up of companies emergencies might easily arise with which no one would have any power to deal, with the result that great injustice might ensue. But in the present case I think I have the power, under s. 91 of the Act of 1862, to order that the first meetings of the creditors and contributories should be resummoned in order to see whether effect should be given to the resolution, passed at the recent meeting of creditors, that it is desirable that the applicants should be represented on the committee of inspection; and, if so, whether by appointing an additional member of the committee or by removing one of the existing committee, and appointing another person in his place. It has been suggested to me that the difficulty might be got over by appointing an additional liquidator with a new committee of inspection in the interests of the foreign creditors. In the first instance, however, I shall direct fresh first meetings to be called, and, if a different view as to my powers is taken elsewhere, I shall do whatever can be legally done to protect the interests of the foreign creditors of the company.

Solicitors for applicant: *Church, Rendell, Todd & Co.*

Solicitors for liquidator: *Downing, Bolam & Co., for Bolam & Co., Sunderland.*

F. E.

BYRNE J.

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Feb. 12, 14.

MIDLAND RAILWAY COMPANY *v.* WRIGHT.

[1899 M. 3429.]

Railway Company—Superfluous Land—Tunnel—Surface of Land over Tunnel—Space above usque ad Cœlum—Telegraph Wires—Statute of Limitations.

A disseisor can acquire against a railway company under the Statute of Limitations a title to the surface of land vertically over a tunnel used by the company, and he thereby acquires a title, not to the surface only, but also usque ad cœlum.

In re Metropolitan District Ry. Co. and Cosh, (1880) 13 Ch. D. 607; *Norton* v. *London and North Western Ry. Co.*, (1879) 13 Ch. D. 268; and *Bobbett* v. *South Eastern Ry. Co.*, (1882) 9 Q. B. D. 424, discussed and considered.

Action to restrain the defendant from removing from over a certain piece of land, being the surface of a certain tunnel, any telegraph lines or wires belonging to the plaintiffs.

By a deed of statutory conveyance dated December 4, 1847, the fee simple of and in a certain piece of land, being part of a larger piece of land called "Wood Close," in the parish of Calverley, in the West Riding of the county of York, was conveyed to the Leeds and Bradford Railway Company.

Shortly after the date of the conveyance the Leeds and Bradford Railway Company constructed a tunnel known as the "Thackley Tunnel" through and under the said piece of land or part thereof, and they and the plaintiffs, as their successors in title, had since continuously occupied, used, and enjoyed the said tunnel as part of their undertaking.

In or about the year 1851 the undertaking and property of the Leeds and Bradford Railway Company, including the Thackley Tunnel and the said piece of land, as alleged by the plaintiff company, became vested in them.

By an indenture dated June 8, 1859, the whole of the piece of land called the "Wood Close" was conveyed and assured by the trustees of the will of the original vendor to one Henry Jowett, through whom the defendant claimed, who entered into possession of the property without notice of the previous sale of the piece of land, part of Wood Close, through which the

tunnel ran, or of any right or title thereto of the plaintiffs. Jowett and his successors in title had remained in possession ever since.

In or about the year 1859 the Electric Telegraph Company, with the consent and permission of Jowett, erected telegraph posts on each side of the said piece of land, and passed telegraph wires from the posts across the said piece of land.

From this date down to and including the year 1868, the telegraph company paid to the said Henry Jowett an acknowledgment of 2*s.* 6*d.* a year, and from that time down to December 31, 1896, the plaintiff company, who in the year 1868 became entitled to the said telegraph wires as the successors in title of the telegraph company, paid the same acknowledgment and enjoyed the use of the wires.

On December 8, 1897, the plaintiff company refused to make any further payment, claiming to be entitled as owners of the said piece of land, and as of right and without any payment or acknowledgment to maintain the telegraph wires over the said piece of land, and this action was afterwards commenced for an injunction to restrain the defendant from removing the wires.

The defendant, by counter-claim, claimed an injunction to restrain the plaintiff company from trespassing upon the said piece of land, or erecting or maintaining any fence thereon, or from permitting to remain over or above the said piece of land any telegraph lines or wires, and for an order to remove the same.

It was proved at the hearing that the "Wood Close," including the land over the tunnel, had been in the continuous occupation of the defendant and his predecessors in title, either by themselves or their tenants, for more than thirty years, during which time the land had been grazed or laid down for hay, and that the plaintiffs had never exercised any rights of ownership over the surface of the land or any part thereof. The plaintiffs disclaimed any intention of fencing in any part of the land in question.

Levett, K.C., and *Sargant*, for the plaintiffs. The plaintiffs' tunnel has throughout been under the land. Therefore the

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surface never was "superfluous land": *In re Metropolitan District Ry. Co. and Cosh* (1), and no title could be acquired to it by another person. *Norton* v. *London and North Western Ry. Co.* (2) and *Bobbett* v. *South Eastern Ry. Co.* (3) refer to land which, though not "superfluous," was separated from that actually occupied by the company by a vertical, not by a horizontal plane. The remarks in *Rosenberg* v. *Cook* (4) are only obiter dicta in a matter arising between a vendor and purchaser under very special conditions of sale. Besides, in that case there had been a discontinuance of possession of the surface by the company by reason of the previous sale and conveyance of the surface by the company.

To give a title under the statute there must be both discontinuance of possession by the true owner and exclusive possession by the stranger, and regard must be had to the nature of the property: *Smith* v. *Lloyd* (5); *Leigh* v. *Jack*. (6) Here there has been no discontinuance of possession by the railway company, who have been continuously occupying and using their tunnel. Nor has there been any exclusive possession by the stranger. The very claim of the defendant, that the possession of the surface carries with it the possession of the space below and the space above, shews that his possession, if as exclusive as he claims, is as to part concurrent only with the possession of the plaintiffs.

There is no case in which, as against the true owner occupying one stratum, adverse ownership by possession has been gained of anything but a space physically bounded, such as a cellar, or tunnel, or seam of coal or other mineral.

If the defendant has acquired anything, it is the mere surface —that is sufficient of the soil and of the air space above for the grazing and meadow purposes for which he has in fact occupied the surface. The presumption of general ownership or possession to be derived from the ownership or possession of the surface is primâ facie only, in the absence of title or other circumstances to the contrary: *Smith* v. *Lloyd*. (5) In this

(1) 13 Ch. D. 607.
(2) 13 Ch. D. 268.
(3) 9 Q. B. D. 424.
(4) (1881) 8 Q. B. D. 162.
(5) (1854) 9 Ex. 562.
(6) (1879) 5 Ex. D. 264.

case the general ownership remains in the plaintiffs, and no more vests in the defendant than the ownership of the stratum he actually occupies. Such an ownership does not cut the general owner off from all above or below the stratum of particular ownership: *Low Moor Co.* v. *Stanley Coal Co.* (1) The ownership of a street by a vestry is an analogy for the sort of ownership (if any) that the defendant may have acquired: *Wandsworth Board of Works* v. *United Telephone Co.* (2); *Tunbridge Wells Corporation* v. *Baird.* (3)

The general question is not affected by the payments made for wires in varying positions. The user of these wires by the defendant or his tenant or licensee could not amount to possession so as to give ownership, and could only go to easement or licence. The wires are at present only a few inches within the line of the tunnel wall, and may well, on the uncontradicted allegations of the statement of claim, have been during some part of the time over the adjoining land. The payments were made and accepted in ignorance of the facts. In fact, the plaintiffs and the defendant apparently never were at one as to the facts.

On the whole case we submit that the plaintiffs are entitled to the injunction as asked, and that the counter-claim ought to be dismissed.

Norton, K.C., and *Clayton*, for the defendant. We submit in the first place that this land could, having regard to the depth of the tunnel below the surface, have been sold by the railway company as superfluous land. It is not a universal rule that land over a tunnel cannot become superfluous land: *In re Metropolitan District Ry. Co. and Cosh* (4); *Ware* v. *London, Brighton and South Coast Ry. Co.* (5); *Grand Junction Canal Co.* v. *Petty.* (6)

Even if this land was not superfluous land and could not be sold by the railway company, a title could be obtained by a disseisor against the company, for such a title can be obtained against railway companies in respect of land not superfluous:

(1) (1876) 34 L. T. 186.
(2) (1884) 13 Q. B. D. 904.
(3) [1896] A. C. 434.
(4) 13 Ch. D. 607, 623.
(5) (1883) 31 W. R. 228.
(6) (1888) 21 Q. B. D. 273.

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Norton v. *London and North Western Ry. Co.* (1); *Bobbett* v. *South Eastern Ry. Co.* (2); and even of land over a tunnel: *Rosenberg* v. *Cook* (3); *Brighton Corporation* v. *Brighton Union.* (4) There are numerous cases in which a title can be obtained under the Statute of Limitations against owners of land who cannot alienate, and cases in which charity lands have been so acquired.

The evidence here shews that we have acquired such a title: *Marshall* v. *Taylor.* (5)

Ownership of the surface gives ownership of everything above the surface and of everything below, cujus est solum ejus est usque ad cœlum: *Lewis* v. *Branthwaite* (6); *Keyse* v. *Powell* (7); *Seddon* v. *Smith* (8); *Corbett* v. *Hill* (9); *Laybourn* v. *Gridley.* (10) Except strata severed in title before the commencement of the disseisor's possession: *Smith* v. *Lloyd* (11); *Walker* v. *Jeffreys* (12); and probably strata of which the disseisee remains in actual possession. A disseisor of minerals or strata under the surface, on the contrary, only acquires that of which he takes actual possession: *Rains* v. *Buxton* (13); *Bevan* v. *London Portland Cement Co.* (14); *Low Moor Co.* v. *Stanley Coal Co.* (15)

Strata above the surface cannot be in fact severed in title unless actually forming part of buildings, because no feoffment could be made of such strata: *Pickering* v. *Rudd* (16); *Kenyon* v. *Hart.* (17)

But even if they can, the railway company here has not been in actual possession of the stratum in question; but, on the contrary, the disseisor has been, because the railway company has for over twenty years paid him an acknowledgment in

(1) (1878) 9 Ch. D. 623; 13 Ch. D. 268.
(2) 9 Q. B. D. 424.
(3) 8 Q. B. D. 162.
(4) (1880) 5 C. P. D. 368.
(5) [1895] 1 Ch. 641.
(6) (1831) 2 B. & Ad. 437; 36 R. R. 613.
(7) (1853) 2 E. & B. 132, 145.
(8) (1877) 36 L. T. 168.
(9) (1870) L. R. 9 Eq. 671.
(10) [1892] 2 Ch. 53.
(11) 9 Ex. 562.
(12) (1841) 1 Hare, 341, 349.
(13) (1880) 14 Ch. D. 537.
(14) (1892) 67 L. T. 615.
(15) 34 L. T. 186.
(16) (1815) 4 Camp. 219; 16 R. R. 777.
(17) (1865) 6 B. & S. 249.

respect of its wires being in the stratum in question. We submit that the action fails, and must be dismissed.

Levett, K.C., in reply.

Cur. adv. vult.

Feb. 14. BYRNE J., after stating the facts, proceeded:—There is no doubt at all that the possession of the defendant and his predecessors has been such an exclusive possession of the surface of the land as, in an ordinary case between two individuals, would have given them an absolute title to the land and all above and beneath, apart from all question as to the existence of the tunnel below.

Then, turning to the questions arising from the fact of one of the parties to the dispute being a railway company, I may say, in the first place, in my opinion, the land in question is not superfluous land, and I think that the case of *In re Metropolitan District Ry. Co. and Cosh* (1) establishes this, notwithstanding a certain doubt which was expressed by Baggallay L.J. in that case. I think, further, it is established by the case of *Norton* v. *London and North Western Ry. Co.* (2) (in that case, however, perhaps the opinion of the Court of Appeal on the point was not necessary for the decision of the case), and by the case of *Bobbett* v. *South Eastern Ry. Co.* (3), and by the observations of Lindley and Smith L.JJ. as to the effect of *Norton* v. *London and North Western Ry. Co.* (4), in the case of *Marshall* v. *Taylor* (5), that a title may be acquired by possession by a stranger to land of a railway company, even though not superfluous land, and therefore land which the railway company could not sell or dispose of. I may mention incidentally that in cases of charity lands also, where the charity is not competent to dispose of the land, it has been held, and there is no doubt, that a title can be acquired by a stranger to lands so belonging, and not capable of being disposed of, by possession. It is true that the cases establishing the proposition I have last mentioned, having reference to

(1) 13 Ch. D. 607.
(2) 13 Ch. D. 268.
(3) 9 Q. B. D. 424.
(4) 9 Ch. D. 623; 13 Ch. D. 268.
(5) [1895] 1 Ch. 641, 648, 651.

BYRNE J. railway companies, deal with land situated laterally with regard to the companies' works, and not to land over a tunnel.

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It is said that the possession to give title and to dispossess must be an exclusive possession, and it was argued that although the possession in the present case of the surface has been exclusive, it has not been an exclusive possession of the land, inasmuch as the possession of it must be looked upon as a partial possession of the whole land including the surface. I cannot accept this. The possession of the surface primâ facie gives title to all above and below subject to rights of owners beneath and above.

It is sufficient for the purposes of the present case to say that I consider that the defendant and his predecessors in title have acquired by possession title to the surface of the land, with so much of what is beneath as is necessary for the enjoyment of it, subject to the right of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as and for a tunnel.

I do not think it is necessary for me to attempt to draw a division in the strata between the surface of the land and the top of the tunnel, and to define precisely where the property of the surface owner ends and the property of the railway company begins. A number of illustrations were put, and a number of hypothetical cases were presented, some of them involving points of nicety, and it was argued that although a man may acquire by possession a title to a cellar, though no part of the house above belongs to him, that although he may acquire a title by possession to a single room in the house, that although he may acquire a title to a cave in a bank or in the ground, nevertheless it is necessary that whatever is acquired by means of this exclusive possession should be measurable by precise metes and bounds and in some way cubically. I think I am rightly expressing the argument which was addressed to me on this point. If this be true, then I think it would follow that the ordinary rights of the owner of the soil would apply, and that the possession of the soil above would carry everything beneath except that which was the property of another party.

I will not say that a question may not perhaps hereafter arise if a stranger sets up a title by possession to something necessary for the carrying on of the railway undertaking, and so claims to have acquired a private right against property which is in a sense dedicated to the public use. The evidence, however, in the present case is that the occupation of the surface is not necessary, although convenient for the railway company for the purpose of carrying the telegraph wires.

I think the defendant has shewn title to the surface and to the space above. It appears to me that, if there had been any doubt in the matter, it is put an end to by the fact that he has actually exercised such a right of ownership in the space above as to have leased a right to the plaintiffs themselves to carry wires over the land.

I think, therefore, that the action fails, and I refuse to grant an injunction.

Then there is a counter-claim, and that is to restrain the plaintiffs from entering or trespassing on the land. There was a threat to come in upon the surface of the land; and therefore I think it would be right to grant an injunction to restrain the plaintiff company from entering or trespassing upon the surface of the land, and from erecting or maintaining any fence thereon, and from permitting to remain over or above the said piece of land any telegraph lines, or wires, or other things belonging to the plaintiff company. There will, therefore, be that injunction.

Solicitors: *Beale & Co.; Jaques & Co.*

G. M.

C. A.
1901
Feb. 19, 20, 21, 22, 25.

COSTA RICA RAILWAY COMPANY, LIMITED *v.* FORWOOD.

[1897 C. 357.]

Company—Director—Fiduciary Relation—Conflict of Interest with Duty—Contracts with Company—Articles of Association—Vacation of Office—Director having an Interest in Contracts—Disclosure of Interest—Voting—Profits—Account.

By the articles of association of a limited railway company, it was provided that a director should vacate his office if he was concerned in, or participated in the profits of, any contract with the company without declaring the nature of his interest; but "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company; or by reason of his being interested, either in his individual capacity, or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest"; but the director was not to vote on any contract of this kind, and if he did, his vote was not to be counted.

In 1886, shortly after its formation, the railway company, of which F. was a director, entered into contracts with a steamship company for the carriage and shipment of bananas. F. was the largest shareholder in the steamship company, and was also a partner in the firm that managed it; no disclosure of F.'s interest was made either in the prospectus of the railway company, or when the contracts were entered into, nor did he ever "declare the nature of his interest" pursuant to the articles of association; but his co-directors of the railway company were aware that he had some interest in the steamship company. F. continued a director of the railway company until 1896, when he resigned, and shortly afterwards that company brought an action against him to make him liable for all profits received by him as shareholder in the steamship company, and as partner in the firm that managed it, under the contracts with the plaintiff company. F. having died before the trial, the action was revived against his executors:—

Held, affirming the decision of Byrne J., [1900] 1 Ch. 756, that, on the articles of association, and on the authority of *Imperial Mercantile Credit Association* v. *Coleman*, (1871) L. R. 6 Ch. 558 (not overruled on this point by S.C. (1873) L. R. 6 H. L. 189), F.'s estate was not liable to account for any profits made by him out of the contracts with the plaintiff company.

Consideration of the equitable rule prohibiting a person who stands in a fiduciary relation from entering into engagements in which his interest

may conflict with his duty, except on the condition of accounting for all profits he may receive from such engagements to the person towards whom he stands in the fiduciary relation.

THIS was an appeal by the plaintiffs, the Costa Rica Railway Company, Limited, from the decision of Byrne J. (1) It is only necessary to add to the facts there stated, that by art. 80 of the plaintiff company's articles of association it was provided that "No director shall vote on any question in which he has a personal interest apart from the members at large."

Neville, K.C., and *Younger, K.C.*, for the plaintiffs. Byrne J. considered that Sir Arthur Forwood was exonerated by clause 81 of the railway company's articles of association, and that the reasoning of Lord Hatherley L.C. in *Imperial Mercantile Credit Association* v. *Coleman* (2) applied. The learned judge thought that that reasoning had been left untouched by the House of Lords when, in *Imperial Mercantile Credit Association* v. *Coleman* (3), they reversed Lord Hatherley's decision. But the basis of the judgment of Lord Hatherley was that there had been a disclosure to the company of the director's interest, and that therefore he was entitled to enter into the contract; and the House of Lords reversed the decision on the ground that there had not been any sufficient disclosure. It is submitted that Byrne J. did not sufficiently consider the question whether Sir A. Forwood had brought himself within the exceptions contained in art. 81.

The questions to be considered are: (1.) Does the exception exonerate the director from disclosing the nature of his interest; and (2.) Does the transaction in question fall within the exception? As Lord Cairns said in *Imperial Mercantile Credit Association* v. *Coleman* (4), a director, "claiming to give validity to a contract which otherwise would be invalid must shew that he has, in letter and in spirit, complied with the provisions of the clause." Sir A. Forwood did not bring himself within the spirit of art. 81, because the nature of his interest was kept secret. The exception deals with a known interest; and that

(1) [1900] 1 Ch. 756.
(2) L. R. 6 Ch. 558.
(3) L. R. 6 H. L. 189.
(4) Ibid. 205.

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this is so shewn by the proviso at the end, that the director who has an interest in the contract shall not vote in respect of it, and that if he does vote his vote shall not be counted. That proviso cannot apply to an interest which is kept secret. Neither did Sir A. Forwood bring himself within the letter of the exception, for it applies only to past contracts—contracts already entered into. The exception speaks of any corporation, &c., which "*has* entered into" contracts with the company. At any rate, the exception applies only to direct contracts entered into by the corporation, company, or partnership with the railway company. The syndicate agreement was not entered into with the railway company. Nor, with reference to that agreement, was Sir A. Forwood "interested in any adventure or undertaking in which the railway company had also an interest," for that company was excluded from any interest in the syndicate agreement. As regards the banana contract, there is nothing to shew that Sir A. Forwood did not vote in respect of it, or that he made any disclosure to the board of the plaintiff company of the nature of his interest in that contract. His co-directors knew that he was a shareholder in the Atlas Company, but they did not know that he had an interest in the bananas, and that consequently it would be to his interest to cut down the amount of the freight. It was his duty, and also to his interest, to make the best possible bargain for the Atlas Company, and thus his interest conflicted with his duty as a director of the plaintiff company. He was in fact the principal shareholder in the Atlas Company. The syndicate agreement was entirely unknown to the directors of the plaintiff company, and that contract does not come within either branch of the exception, because the plaintiff company were not parties to it, and had no interest under it. Non constat that there would have been any profits on the sale of the bananas but for the agreement under which they were carried at exceptional rates of freight. If a trustee cannot distinguish between the profits which he has derived by means of his trust estate and the profits which he has derived independently of that estate, the whole of his profits will belong to his cestuis que trust. A partner will

not be allowed to obtain a private advantage at the expense of the firm. He is bound to do his best for the partnership, and to share with his partners any benefit which he may have been able to obtain from others, and in which the firm is in honour and conscience entitled to participate: Lindley on Partnership, 6th ed. pp. 316 et seq.; *Benson* v. *Heathorn* (1); *Russell* v. *Austwick* (2); *Lock* v. *Lynam.* (3) The syndicate agreement made it the direct interest of the Atlas Company that freight, like any other outgoing, should be as low as possible, and for this reason it was essential that the railway company should be informed of the existence of that contract. The onus is on the defendants to shew that their testator came within the exception from the rule in art. 81. The second proviso at the end of the exceptions in art. 81 does not apply to the first part of the exceptions, because that part relates only to the past, to contracts already entered into with the company, as to which there could be no voting by the director.

[RIGBY L.J. The first part would apply to a director who became such immediately after a contract had been entered into with the company.

VAUGHAN WILLIAMS L.J. There might be voting by the directors with regard to a contract during its continuance.]

The clause contemplates a voting at the commencement of a contract. The final proviso applies to the rule as well as to the exceptions. No construction of the clause would be fair which would enable a director to retain an interest which he derived secretly from a person who apparently was alone contracting with the company. Sir A. Forwood was either within the rule laid down by art. 81, or, if he came within the exception, he is within the proviso at the end of it, and his estate is accountable for the profits derived under the syndicate agreement by the Atlas Company and by Leech, Harrison & Forwood, who were ship's husbands to that company.

Levett, K.C., Swinfen Eady, K.C., and *Bremner*, for the defendants. No imputation of fraud is now made against

(1) (1842) 1 Y. & C. Ch. 326. (2) (1826) 1 Sim. 52; 27 R. R. 157.
(3) (1854) 4 Ir. Ch. Rep. 188.

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Sir A. Forwood, and it is submitted that the plaintiffs are not entitled to any relief.

It has been suggested that the apparent interest of the Atlas Company under the banana contract differed from their real interest as shewn by the syndicate agreement. But the Atlas Company by the banana contract guaranteed to the railway company an absolute minimum amount of freight. The directors of the railway company were aware that Sir A. Forwood had an interest in the Atlas Company and also in Leech, Harrison & Forwood. The banana contract is not impeached, and it was, in fact, a beneficial contract to the railway company. On the face of it, it was evident that the Atlas Company had an interest in that contract, and it is not alleged that its terms were unfair, or that better terms could have been obtained by the railway company. It was essential to secure a rapid and regular transport for the bananas, and it was important to the railway company to obtain this traffic, and by this contract they obtained it. Of what consequence was it to the railway company what became of the bananas after they had carried them? Suppose a trustee lets a house which is subject to the trust to his partner at its fair letting value, and the partner makes a profit by means of the house, how is the trust property injured? If the trustee lets the house at an undervalue, he will be accountable only for the difference between the proper rent and the rent actually obtained, not for the profit made by the partner. If the banana contract cannot be impeached, on what principle can the railway company claim the profits derived from any dealing with the goods after they have carried them to their destination? There is no connection between the two things. The subsequent profits are not earned by means of the railway. The railway company have been fairly paid for their services, and they get their freight whatever may happen to the goods afterwards. The argument must go to this extent—that, so far as Sir A. Forwood was concerned, the Atlas Company ought to have carried the bananas for nothing. The Atlas Company did not derive any profit under the banana contract; they were only bound to make payments to the railway company.

As to the syndicate agreement, it only provides that the Atlas Company are to be paid their freight by means of a specified share of the proceeds of the sale of the bananas. The railway company had no interest in that agreement.

[VAUGHAN WILLIAMS L.J. It might affect the railway company if their director was induced to enter into the banana contract by means of his interest under the syndicate agreement.]

Then, as to the right of one partner to an account of outside profits made by a co-partner: a partner is not bound to account to his co-partners for profits made by him in carrying on a separate business of his own, there being no fiduciary relation; all that his co-partners can do is to bring an action for damages for breach of his covenant in the partnership articles not to carry on a separate business: *Dean* v. *MacDowell* (1); *Aas* v. *Benham* (2); *White* v. *City of London Brewery Co.* (3) In *Russell* v. *Austwick* (4), relied on by the appellants, and which is referred to in Lindley on Partnership, 6th ed. pp. 322–3, there was a directly competing business, so mixed up with the partnership business that it could not be treated as a separate business. Here, what was done with the bananas after their delivery at the port of Limon did not in any way compete with the railway company, but was an entirely separate matter carried out by the shipping companies. We, therefore, submit, first, that, apart from any special contract by Sir A. Forwood, neither he nor his estate is liable to account; and, secondly, that supposing he did make himself primâ facie liable, it is necessary to look at these articles and see what the duties of a director are. Now, the first part of art. 81 is cut down by the "exceptions" that follow it, the effect of which is only that a director is not to vacate his office by reason of his having an interest in any contract with the company; and the proviso at the end merely prohibits a director who has an interest in a contract with the company from voting on that contract. To say that the exception applies only to past contracts is to adopt too narrow a construction. It should be read as applying to

(1) (1878) 8 Ch. D. 345.
(2) [1891] 2 Ch. 244, 255, 260.
(3) (1889) 42 Ch. D. 237, 242, 243.
(4) 1 Sim. 52; 27 R. R. 157.

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contracts which "shall have been entered into." A case of this kind is really outside the ordinary principle that a partner cannot make a profit at the expense of his co-partners. It is important to have men of experience on the boards of commercial or industrial companies, and it follows that they are often men carrying on cognate businesses which give them the very experience qualifying them to act as directors. If the appellants are right in their contention, and if art. 81 has not the effect we say it has, it will be impossible to obtain for a company directors who may be at the same time directors of another company of a similar kind which may have, or be likely to have, business transactions with the other company. In such a case as the present, it is hard for a company to say to its director, who happens also to be the director of another company which has entered into a contract with it, "Having got the benefit of your experience and services, we now call upon you to account for your share of the profits the other company has made." We submit that the doctrine of principal and agent, or of the duty of one partner to another, does not apply to such a case as this.

Neville, K.C., in reply. We rely upon what has been termed the "inflexible rule," that no man acting as an agent can be allowed to put himself in a position in which his interest and his duty will be in conflict; and that no agent, in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal: *Parker* v. *McKenna* (1); *Burton* v. *Wookey* (2); *Albion Steel and Wire Co.* v. *Martin* (3); *Bray* v. *Ford.* (4) I submit that a fiduciary relation was established between Sir A. Forwood and the plaintiff company of which he was a director, and, that being so, he became accountable to his company for the profits he made out of the contracts with it. The state of the law as between partners is shewn by the two cases cited on behalf of the respondents: *Dean* v. *MacDowell* (5) and *Aas* v. *Benham* (6); that is to say, where the two busi-

(1) (1874) L. R. 10 Ch. 96, 118, 124.
(2) (1822) 6 Madd. 367; 23 R. R. 249.
(3) (1875) 1 Ch. D. 580, 585.
(4) [1896] A. C. 44, 51.
(5) 8 Ch. D. 345.
(6) [1891] 2 Ch. 244.

nesses are not in rivalry, so that there is no breach of any fiduciary relation, the remedy is in damages for breach of covenant in the partnership articles; but where a business is carried on in breach of the fiduciary relation, the profits made in that business must be accounted for.

An agent must make full disclosure of the exact nature of his interest: it is not enough merely to disclose that he has an interest or to make statements such as may put his principal on inquiry: *Dunne* v. *English* (1); *Battison* v. *Hobson*. (2)

RIGBY L.J., after stating the object of the action, proceeded:—The equitable principle upon which a man in a fiduciary relation who makes what are called "secret profits" is bound to give them up to the principal for whom he is acting is a most salutary one, and of general application, and I do not intend, in the observations I am about to make, to say anything that will in any way infringe upon that principle. Many people think it a hard principle; but to those who have had experience in such matters, it is found to be a principle of necessary application in order to make sure that people will do their duty when they are acting under circumstances of unusual difficulty. It does not depend upon fraud, and in the present case no imputation is made of anything approaching to fraudulent conduct on the part of Sir A. Forwood; but it does not in the least follow that, with perfect honesty of purpose, he may not have done something which, without his being aware of it, was contrary to principle and for which he must be made liable.

Now, we have to deal principally with three contracts—two of them made on May 19, 1886, of which the first has been called the "construction contract," and the second the "banana contract."

The third contract, which has been called the "syndicate agreement," is dated somewhat later, June 21, 1886, but I shall assume it, for present purposes, to have been contemporaneous with the other two contracts. It is necessary that I should state in some detail the position of the respective parties, as a

(1) (1874) L. R. 18 Eq. 524, 533, 535. (2) [1896] 2 Ch. 403, 413, 414.

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great deal turns upon that. Now, first of all, there was a railway company, which was recent in its origin, and was a limited company having its registered office in London, and at the time when we have to consider its position it was not yet fairly floated, having no completed railway and not having placed its capital. That company by the construction contract entered into a bargain with one Minor Cooper Keith, who seems to have been an important personage in relation to the Government of Costa Rica, for incidentally it appears that he had undertaken to a very great extent the management of their finances, that he had built and equipped a railway, and that in fact his operations in connection with the Government and the railway were very considerable. That being Keith's position, he, by the "construction contract," agreed with the railway company that he would build and equip certain new railways at the price and on the terms therein mentioned, including a provision that, during the progress of the building of the railways, which would occupy some years, he should, in consideration of services rendered, be entitled to hold and work, for his own purposes, the existing railway, or any portion of the new railways that might be built by him. The existing railway comprised, among other lines, a line from Carillo in the interior to Port Limon on the sea coast; and it followed from the arrangements made that, until he had completed the new railways and handed them over to the railway company, he was to be entitled to deal with the line from Carillo to Port Limon substantially as if it were his own line, worked for his own profit and without his being responsible for the way in which he worked it.

The second contract, the "banana contract," is very important. [His Lordship then stated the effect of it, and continued:—] Upon that contract it appears to me that the railway company treated Keith, the Atlas Company, and Phipps & Co., as the owners of, or, as at any rate, entitled to dispose of, all the bananas shipped, and did not treat, and, indeed, it was impossible for them to treat, Keith as being exclusively the owner of the bananas, though they undoubtedly proceeded from him in the first place, for he either cultivated

them himself, or purchased them according to the terms of this contract. Now, it is idle to say that the railway company understood that the bananas were to remain his, and that he alone was to be treated as entitled to all the adventure, and that the shipping companies were to be treated as carriers only. This contract is, obviously, very different from a contract with a single owner, like Keith, for carrying his bananas; and it certainly contemplated that, at all events at some future time, the two steamship companies might have a direct interest in the bananas themselves, and that the business was to be carriage in concert with the railway company and one out of which the steamship companies might make profits.

Now, the third contract, the "syndicate agreement," and which, as I have said, I shall treat, at least for the present purpose, as a contemporaneous contract, was substantially treated by the parties to it as coming into force along with the others, and practically its provisions were agreed upon by the time the other contracts were executed. That contract begins by saying that it was "to be read as an annex to the banana contract"; and, as between the parties, undoubtedly that was so. It was to give effect to arrangements between them which they perfectly well understood at the time the other two contracts were executed, but which they intended should be reduced into writing; and those arrangements were intended to specify precisely the individual interests of the contracting parties, other than the railway company, in the banana contract. Of course the railway company were not parties, for, since their interest in the bananas became entirely at an end when they had stowed them away on the steamship company's steamers at Port Limon, they had, speaking generally, no sort of interest in any arrangement the contracting parties might make between themselves: that was a matter of absolute indifference to them; and if there had been no one else concerned except the contracting parties, I do not think it would have been suggested for a moment that the railway company had any right to see, or any interest in seeing, this third contract.

[His Lordship then stated the effect of that contract, pointing out that the object of it was to provide for the sale of the

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bananas by the two steamship companies, and the division of the proceeds between Keith and those two companies. His Lordship continued :—]

If, then, it was a matter of absolute indifference to the railway company what division might be made by the parties interested under this contract of the proceeds of the bananas, what is the ground for saying that the railway company ought to have been informed of the different interests that existed under this syndicate agreement? The ground for that contention is put in this way, and in this way only. Sir A. Forwood was a director of the railway company. Obviously, in the banana contract, there was no means of ascertaining directly what interest he took under the syndicate agreement. He was known by the directors of the railway company to have an important interest in the banana contract. I do not say that they knew the precise nature of his interest ; but he had an important interest as a shareholder in the Atlas Company. Whatever, then, the interest of the Atlas Company might be, he would take his share as a shareholder. And in like manner he was senior partner in the firm of Leech, Harrison & Forwood, and the directors of the railway company knew that Leech, Harrison & Forwood were managers of the Atlas Company's line of steamers, or "ship's husbands," as Mr. Neville not incorrectly called them. Of course they knew the Atlas Company were intending to make profit out of the business, and that Leech, Harrison & Forwood would be paid in some way—I do not think they knew at that time in what way, nor does it appear to me very material. It is only by establishing their right to a share by reason of Sir Arthur Forwood's fiduciary position in the profits made by the Atlas Company, or in the remuneration of the firm of Leech, Harrison & Forwood, that the railway company can shew that they have the remotest interest in that syndicate agreement. When once they have stowed the bananas on board ship pursuant to the banana contract, they have lost all interest in them, and it does not matter to them whether there is a profit or whether there is a loss. They can only make out that they have an interest by shewing that they are entitled to share in the

profits intended to go to the Atlas Company, or in the profits that were intended to go to Leech, Harrison & Forwood.

Now, in this case we are not left merely to apply the general rule of equity arising out of secret profits made by a fiduciary agent, such as a director, and concealed from his shareholders, for we have in the articles of association of the railway company express provision on the subject. From what I have pointed out, it will be seen that the Atlas Company's profits, and Sir Arthur Forwood's interest as a shareholder in those profits, were important matters for consideration; and in a less degree it may be that the profits made by Leech, Harrison & Forwood, as ship's husbands to the Atlas Company, were also important, and we must see how the articles of association dealt with cases of that nature.

Art. 80 is this: "No director shall vote on any question in which he has a personal interest apart from the members at large." That is a very general clause: it is not so specific as that which follows, but it is not without importance. That appears to me to shew that a director in this company is not precluded from having interests which may not be in common with the members at large; but if he has such interests, he must not vote; and I take it that, if he did vote, he would be bound by the general equity which charges a fiduciary agent with the concealed profits that he makes.

But the article which is most important is art. 81, the first part of which provides for the contingencies on which the office of director shall be vacated. [His Lordship read that part of the article, and continued:—]

That is a perfectly general clause, and there again I assume that, if a director were concerned or participated in the profits of a contract with the company, and did not make a sufficient declaration in writing of the nature of his interest, he would be liable under the equitable rule. But that clause is subject to this exception, which is included in the latter part of art. 81, and is as follows: "That no director shall vacate his office by reason of his being a member of any corporation, company, or partnership which has entered into contracts with, or done any work for, the company." That is a very wide clause indeed.

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Now, taking for the moment the case of the Atlas Company alone, it would appear primâ facie that the exception was made for the express purpose of excluding from consideration any interest whatever which Sir A. Forwood might have as a shareholder in that company; and it was admitted by counsel on behalf of the railway company—and in this Court, at any rate, it could not be in question—that if Sir A. Forwood is within the exception he would be permitted to take the profits. I think, speaking for myself, it is plain that he is within that exception so far as his interest in the Atlas Company is concerned; and, without relying unduly on the admission of the railway company, I think we must come to that conclusion, even if there had been no such admission, because undoubtedly in *Imperial Mercantile Credit Association* v. *Coleman* (1), which was the case most relied on, quoted, and dealt with on both sides in the present case, Lord Hatherley L.C. held, upon a similar clause, that the director in that case was not liable to account for profits made from contracts with the company of which he was a director. This being a Court of co-ordinate jurisdiction, that decision, which was not overruled by the House of Lords, is binding upon us, and we ought to follow it. No doubt Lord Cairns, when the case came before the House of Lords, did say that he would accept the ruling of Lord Hatherley on that point without affirming it—meaning that upon a future occasion he might wish to have it reconsidered. However, Lord Hatherley's ruling must, for the present, be taken as binding on this Court. That being so, I hold that, so far as Sir A. Forwood's interest in the Atlas company is concerned, the case is concluded, and the plaintiffs, the railway company, can have no account of profits received by him as shareholder in that company. Still less can they have what they seek by the action—an account of all profits made by the Atlas Company. In that respect this case fundamentally differs from that of *Imperial Mercantile Credit Association* v. *Coleman*. (2)

But it is said the case is different with regard to Leech, Harrison & Forwood, inasmuch as they never entered into a contract with the railway company at all, which appears to be

(1) L. R. 6 Ch. 567. (2) L. R. 6 Ch. 558; L. R. 6 H. L. 189.

true: they never did. But is the case really different—that is to say, is the position of Leech, Harrison & Forwood one involving a member of that firm in the liability to account quite independently of their ever having made a contract with the railway company? I think it is not. [His Lordship then considered the position of the firm, and, after observing that they were merely acting as agents or servants of the Atlas Company, held that, inasmuch as, with regard to the Atlas Company, Sir A. Forwood was protected, and intended to be protected, by art. 81 of the plaintiff company's articles of association, it necessarily followed that, as a member of the firm of Leech, Harrison & Forwood, he was protected from any liability to account for the profits made by the firm, those profits being merely a deduction from the proceeds of the banana speculation which would otherwise have gone to swell the profits of their employers, the Atlas Company. His Lordship then continued:—]

I will go even further than that. It is plain that the railway company's directors knew as well then as we do now, that the object of the Atlas Company was to make profits out of the contracts; and it would be shocking, to my mind, if it were held that the railway company should be able to follow up the profits of the Atlas Company in the manner they now seek to do merely because Sir A. Forwood was a partner in the firm who were the agents or servants of that company. [No attempt has been made to shew that Sir A. Forwood ever did what was contrary to the railway company's articles of association—that he ever voted or joined in any vote about the contracts.] I assume, therefore, he never did vote, and I hold that neither as a shareholder in the Atlas Company, nor as a partner in Leech, Harrison & Forwood, is he, or his estate, liable to account to the plaintiffs, the railway company.

I am, therefore, of opinion that the judgment of the learned judge below is right, and that this appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. I also think this appeal ought to be dismissed. I do not suppose that in the arguments on

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behalf of the respondents it was intended directly to question the stringency of the rule which does not allow directors, trustees, agents, or others standing in a fiduciary relation, to enter into engagements conflicting, or which may possibly conflict, with the interests of those whom they are bound to protect. But, although that general rule was not really questioned, yet it did seem to me that a great deal of the argument suggested something of this sort: even if Sir A. Forwood was interested in these contracts, and interested in a way which made it impossible to deny that he might possibly have had an interest which might conflict with his duty, still it would be wrong to hold him accountable, either because it would not be fair to do so, or because the company of which he was a director had not suffered any injury, or because the profit which he had earned was a profit which could not really be earned by the company itself. A whole series of partnership cases was cited to us in order to shew that a partner could not be held responsible for profits that his firm could not have gained. It seems to me, without going at length into authorities, that there is no ground for any such contention. There is one case which was not cited during the argument, though there was ample other authority cited to the same effect, but which I will refer to for what I may call a "text-book reason," for the head-note contains an admirable summary of the law, a summary fully justified by the speeches of the noble Lords; and that is the case of *Aberdeen Ry. Co.* v. *Blaikie.* (1) The head-note is this: "It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object. It may be that the terms on which a trustee has attempted to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the

(1) (1854) 1 Macq. 461; 9 Scots Revised Rep. (H. L.) 365.

rule that no inquiry into that matter is permitted." As I understand, the rule is a rule to protect directors, trustees, and others against the fallibility of human nature by providing that, if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby, and will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their cestuis que trust, and although the profits may be such that their cestuis que trust could not have earned them all. With reference to this last point, there is a recent and direct decision that the fact that the profits could not have been earned by the cestuis que trust is wholly immaterial; and that is a decision of the Court of Appeal in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (1)

Again, it appears from *Dunne* v. *English* (2), and particularly from the judgment of Sir George Jessel (3), that if the liability of the director, trustee, or agent to account depends upon disclosure, the disclosure must be a full disclosure, and that it is not sufficient for the person in a judiciary capacity to say, "I gave you sufficient information to put you upon inquiry." I suppose, moreover, that, generally speaking, it would not be sufficient for a director of a company to shew that, as between himself and his brother directors, the whole matter was above-board. I think that was established by *Albion Steel and Wire Co.* v. *Martin.* (4) But starting with all those propositions, I have arrived most unhesitatingly to the conclusion that Sir A. Forwood has not been brought, by his transactions with the Costa Rica Railway Company, within the operation of the wholesome doctrines to which I have been referring.

Now I do not think one can do better in this case than start with the admissions. There is an admission on the part of the plaintiffs, first, that the directors of the plaintiff company knew before and at the time of the making of the banana contract of May 19, 1886, that Sir A. Forwood was a member

(1) (1888) 39 Ch. D. 339.
(2) L. R. 18 Eq. 524.
(3) L. R. 18 Eq. 535.
(4) 1 Ch. D. 580.

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of the firm of Leech, Harrison & Forwood, and that the firm were the managers of the Atlas Steamship Company. Secondly, the plaintiffs admit that the directors were also aware at that time that Sir A. Forwood was beneficially interested in the Atlas Company. Then there are admissions on behalf of the defendants, first, that the directors of the plaintiff company, other than Phipps, were not aware of the actual terms of the agreement between Leech, Harrison & Forwood and the Atlas Company, or of the terms or existence of the syndicate agreement of June 21, 1886. Secondly, the defendants admit that no formal declaration in writing was made by Sir A. Forwood that he had any interest in the banana contract or in the syndicate agreement. Now, before examining the three contracts in question, namely, the construction contract, the banana contract, and the syndicate agreement (all of which constituted in effect one transaction, so far as Sir A. Forwood was concerned, and were entered into practically at the same time), or the articles upon which the defendants rely, I wish to say a word or two with regard to the admissions. I think it is impossible to read the admissions of the plaintiffs without taking into consideration the terms of the banana contract itself—that is to say, those admissions are not only admissions that the directors of the plaintiff company knew that Sir A. Forwood was beneficially interested in the Atlas Company, but they are coupled with the necessary and admitted fact that the directors were aware of the terms of the banana contract and of all the facts recited in it.

Without going at length into the banana contract, it seems to me that the only legitimate inference to be drawn from the recitals in it is that the Costa Rica Railway Company, through its directors, was perfectly well aware that Sir A. Forwood was beneficially interested in a contract, the basis of which was his interest in the banana traffic. I mean by that, that it was perfectly plain upon the face of that contract that he had a larger interest than merely that of acting as carrier for Keith —that the Atlas Company had an interest in this banana contract which was in no way limited to their contract as carriers. That, then, being so, and that being the state of

knowledge of the Costa Rica Railway Company and its directors, I am clearly of opinion that, apart from any question as to the effect of the articles, there was nothing in this case to render Sir A. Forwood subject to any liability, as a director of that company, to account in respect of what I will shortly call "secret profits."

I now proceed to consider the effect of the 80th and 81st articles. It is not really disputed that where there are articles of this sort and the director can shew that what he did was authorized by the articles—can shew, in other words, that the company have, by their relation with him as established by the articles, waived their right to have his unbiassed voice in every matter and to require him to abstain from putting himself in a position where he might have conflicting interests, the director is, according to the decision of Lord Hatherley in *Imperial Mercantile Credit Association* v. *Coleman* (1), entitled to rely upon the articles as justifying his action and thus escape the liability to account. The question, then, is whether, in this case, it has been established that what was done by Sir A. Forwood comes within the authority of these articles. The judgment of Byrne J. is that it does come within the articles, and I agree with that learned judge. If Sir A. Forwood brought himself within the "exceptions" in art. 81—if his conduct was covered by those exceptions—he not only did not vacate his office, but he could not, and his estate cannot, be called upon to account for the profits received by him under the contracts. Art. 81 says that the office of a director is to be vacated "if he is concerned in, or participates in the profits of, any contract with the company, or of any work done for the company, without declaring and setting forth in writing the nature of his interest, such declaration, if his interest then exists, to be made at the meeting of the board at which such contract is determined on or work ordered, and in any other case at the first meeting of the board held after the acquisition of his interest." Now, the banana contract, as it stands, seems to come within that clause of art. 81, for it is admitted that there has been no declaration or setting forth in

(1) L. R. 6 Ch. 558.

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writing of the nature of Sir A. Forwood's interest. But then comes this exception: "That no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company." I take the view that Byrne J. took of the effect of the use of the past tense "has entered"; and it seems to me perfectly plain that this banana contract is a contract entered into with the plaintiff company within the meaning of this clause. It seems to me also perfectly plain that Sir A. Forwood is really not liable to vacate his office or to account for profits by reason of his being a member of the Atlas Company. The banana contract and the membership of Sir A. Forwood in the Atlas Company seem to be exactly the cases provided for by this clause; and I did not understand that the contrary was very strenuously argued by the appellants. They indeed seemed to admit that, in so far as profits flowed from that contract, the case fell within the clause, and that Sir A. Forwood could not have been called on to vacate his office, and therefore was not liable to account.

But then the plaintiffs say that they really did not know the extent of Sir A. Forwood's interest; that they knew he had an interest, but did not know the particulars of that interest; that they did not know of the syndicate agreement, nor of his interest in the firm of Leech, Harrison & Forwood. With regard to the quantity of his interest, as I understand, it is admitted that the plaintiffs could not have sought to compel him to account by reason that they did not know the quantity of shares that he held; but they say that they had no notion that he had any interest otherwise than as a shareholder; that they had no notion that he had any interest as owner of the bananas which were to be carried. It seems to me that the answer to that is, to look at the banana contract itself; and that is why I said I thought the admission ought to be read together with that contract. Looking at that contract, even leaving out of consideration what seems to me to be a very plain inference, namely, that both the Atlas Company and Phipps & Co. had an interest in the banana traffic otherwise than as mere carriers, it is clear that the Costa Rica Railway

Company knew perfectly well that these carriers who undertook the duties stipulated for by the contract would not do so without remuneration.

Under those circumstances the Costa Rica Railway Company seem to me to have had the most ample notice that the Atlas Company stood in such a relation to Mr. Keith, or whoever was the owner of the bananas, as necessarily entitled them to a large remuneration—a remuneration beyond the ordinary freight payable to a shipowner for the carriage of goods.

[His Lordship next stated the terms and the effect of the syndicate agreement, and continued:—]

It seems to me absolutely plain that the company had every disclosure which was material to them to know with reference to the interest of their director and to any conflict of duty that might arise from that interest. They did know in truth and in fact the nature of his interest: they did know what he was doing for Keith; and they did know perfectly well that the Atlas company, in which he was a shareholder, were to be remunerated for the services they rendered and the obligations which they undertook.

Now, I will only add a word or two about the firm of Leech, Harrison & Forwood. It is said that Sir A. Forwood, as a member of that firm, who were ship's husbands to the Atlas Company, is liable to account for his share of their percentage of 5 per cent. on the gross earnings of that company. But since we have come to the conclusion that Sir A. Forwood is not, as shareholder, accountable for his interest in the gross earnings of the Atlas Company, it is impossible for us to hold that he is accountable for any part of the percentage that had to be measured by those earnings. Upon all these grounds I am of opinion that this appeal should be dismissed.

STIRLING L.J. I propose to state very shortly the reasons which have led me to come to the same conclusion as the Lords Justices.

The plaintiffs launched their case relying on a well-known rule of equity which, I agree, should not be infringed upon in any way. I will state that rule as being, for the present

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purpose, as follows: if a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit. The main contention of the defendants is this, that although that is true, still, where the persons between whom the fiduciary relation exists are sui juris and there is no unfair dealing, that rule may be relaxed or even be abrogated; and the main question in this case is, whether such abrogation has taken place. The defendants say that that is to be found in the articles of association of the plaintiff company.

Now, those articles of association provide that the office of director shall be vacated "if he is concerned in, or participates in the profits of, any contract with the company, or of any work done for the company, without declaring and setting forth in writing the nature of his interest." But then follows this clause: "But the above rules shall be subject to the following exceptions:—That no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into any contracts with, or done any work for, the company." Then, a little further on, there is this proviso: "Provided nevertheless that in no case shall any director having such interest as aforesaid vote in respect of such agreement, contract, work, adventure, or undertaking, and if he or they so vote, such vote shall not be counted." Now Byrne J. has held, in accordance with the view expressed by Lord Hatherley, that although this clause only refers to the vacating of the office of directer, it also provides relief from the rule in equity to which I have referred, so far as the exception prevails, and with that I agree.

The question then comes to this: Do we find here an exception applicable to the present case? In my opinion we find it in the clause I have read: "No director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company." Stopping there, it seems to me that the effect of that clause is to exonerate a director who fulfils the conditions from making any disclosure beyond

that of stating that he is a member of a corporation, company, or partnership, with which the contracts have been entered into. In the present case the late Sir A. Forwood was a director of the plaintiff company, and there is no question that he stood in a fiduciary position to that company. He did not himself enter into any contract with that company, but he was a member of a company called the Atlas Company, which did enter into a contract with the plaintiff company. It seems to me that his sole obligation was, as I have stated, to disclose that he was a member of that company, and that duty he fulfilled, it being an admitted fact in the case that his position as a shareholder, and a very large shareholder, in the Atlas Company was known to the directors of the plaintiff company. The complaint in the present case is this, that though, of course, the terms of the banana contract were well known to the plaintiff company, yet the syndicate agreement, which was annexed to the banana contract, was not disclosed to the directors; but it appears on the face of the banana contract that there were and must have been relations between Mr. Keith, the Atlas Company, and Messrs. Phipps & Co., who, along with the plaintiff company, were parties to the banana contract. The nature of the interest is not by this clause required to be disclosed, and the arrangements which were therefore made for the remuneration of the Atlas Company in respect of certain services which, as appears by the banana contract, they were to render, Sir A. Forwood was under no obligation to disclose. I think on that short ground, as regards the membership of Sir A. Forwood in the Atlas Company, he was not under any liability to make any disclosure of the syndicate agreement, and therefore must be exonerated from the relief sought against his estate in the present action.

But that was not the sole interest of Sir A. Forwood in these matters. He was also a partner in the firm of Leech, Harrison & Forwood, and that firm acted as ship's husbands to the Atlas Company. For their services in that capacity they were remunerated by a commission of 5 per cent. on the gross earnings of the ships.

Now with reference to that part of the case it seems to me

C. A. 1901 COSTA RICA RAILWAY COMPANY, LIMITED v. FORWOOD. Stirling L.J.

that this test may be applied: Was Sir A. Forwood, by reason of his membership in that firm, placed in a position in which his duty and interest conflicted? The answer I give to that question is, No. The services for which the firm was to be remunerated were those to be rendered to the Atlas Company in carrying bananas from Port Limon to New York, and were entirely beyond the scope of the contract by which the bananas were conveyed from the interior of Costa Rica to the port with which alone the plaintiff company was concerned. If, therefore, the firm's remuneration had been provided for by a lump sum, it does not seem to me that the case would have been arguable. The only ground for doubt is this, that the remuneration is dependent on the earnings of the ships; but it depends on gross earnings, not on profits; and, in my judgment, the fact that the remuneration is represented by a sum which includes profits, is not sufficient to make the duty of Sir A. Forwood, as a partner in that firm, conflict with his duty as a director of the plaintiff company.

I think, for these reasons, that the appeal ought to be dismissed.

Solicitors: *Norton, Rose, Norton & Co.; Ashurst, Morris, Crisp & Co.*

G. I. F. C.

COLLINGHAM *v.* SLOPER.

C. A.
1901
Feb. 27.

[1892 C. 2801.]

Practice—Compromise—Power of Court to bind Absent Persons—Extent of Jurisdiction—Rules of Supreme Court, Order XVI., *r.* 9A.

In an action on behalf of the holders of bonds (payable to bearer), issued by a railway company, against the trustees for the bondholders, the company, and other defendants, the Court in 1894 sanctioned a scheme for the compromise of the action, and, being of opinion that the scheme would be for the benefit of all the bondholders who were not parties to the proceedings, ordered that it should be carried into effect so as to be binding on all the holders of the outstanding bonds, other than three specified persons who dissented and for whose claims provision was made. The scheme provided that out of the funds then in the hands of the trustees there should be set aside for distribution in respect of 61,383 bonds which were then outstanding, "when and as soon as the holders thereof shall be duly ascertained, within fourteen days after presentation of the same for payment, upon such bonds being delivered up to be cancelled," a sum sufficient to pay 2*l.* 10*s.* in respect of each bond. The order directed payment accordingly to the bondholders. After this order had been made, most of the bondholders from time to time surrendered their bonds upon payment to them respectively of the sum of 2*l.* 10*s.* for each bond surrendered. Ultimately there remained 1700 bonds still outstanding. Every effort had been made, by means of advertisements and otherwise, to discover the holders of these bonds, but without success :—

Held (by Rigby and Stirling L.JJ., Vaughan Williams L.J. dissenting), that the Court had no jurisdiction to limit a time within which the unascertained holders of the outstanding bonds must come in, or otherwise be excluded from the benefit of the scheme.

Per Vaughan Williams L.J.: In construing the scheme it ought to be implied, even as against unascertained bondholders, that they must elect within a reasonable time whether they would come in under the scheme.

THIS action was brought by three plaintiffs, on behalf of themselves and all others the holders of the first mortgage bonds or obligations (each of the nominal value of 20*l.*) issued by a Spanish company, called the Saragossa and Mediterranean Railway Company, against the London commissioners of the company, the company, and several other defendants, for the purpose of having the trusts, under which the moneys subscribed in respect of the obligations were held by the London commissioners, performed and carried into execution. A second

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action was commenced by other holders of the obligations with a similar object; and a third action was commenced by the plaintiffs in the second action for the purpose of obtaining a declaration that the objects for which the moneys had been subscribed in respect of the obligations were no longer capable of being performed.

The obligations were payable to bearer.

On January 27, 1893, North J. gave judgment in the three actions. (1) An appeal was presented against this judgment, and while the appeal was pending a scheme for the compromise of the actions was prepared and was assented to by most of the holders of the obligations, and a petition was presented by the plaintiffs in the first action for the sanction of the Court to the scheme. North J. refused to sanction it. The petitioners appealed, and on August 9, 1894, the Court of Appeal held that the scheme ought to be sanctioned, and that under Order XVI., r. 9A, it ought to be declared binding upon those holders of the obligations who were not before the Court. (2)

At the time when the petition was presented the number of obligations outstanding was 61,383.

The scheme contained the following provisions: "The funds in the hands of the London commissioners, amounting to 218,734*l.* 0*s.* 11*d.*, and which, if freed from all claims (other than costs), would be sufficient to pay 3*l.* 8*s.* 10*d.* per obligation, shall be dealt with as follows: (*a*) To provide for the costs and commissioners' expenses in these actions, &c., there shall be set aside the sum of 7474*l.* 4*s.* 5*d.*, together with the interest and dividends from time to time to accrue due and payable on the investments of the funds while in the hands of the London commissioners. (*b*) For distribution in respect of the 61,383 obligations issued by the railway company when and as soon as the holders thereof shall be duly ascertained (being at the rate of 2*l.* 10*s.* per obligation) within fourteen days after presentation of the same for payment, upon such obligations being delivered up to be cancelled, there shall be set aside the sum of 153,457*l.* 10*s.* (*c*) To form a fund for the settlement of the claims against the moneys in the hands of the London

(1) Vide [1893] 2 Ch. 96. (2) Vide [1894] 3 Ch. 716.

commissioners and to complete the first section of the railway there shall be set aside the sum of 18*s.* 10*d.* for every obligation surrendered (being the difference between the sum of 2*l.* 10*s.* to be paid to the holder thereof and the sum of 3*l.* 8*s.* 10*d.* to which each obligation holder would be entitled out of the funds in the hands of the commissioners, if freed from all claims other than those of the obligation holders and costs), such fund to be distributable" in a manner agreed upon, "and which on the surrender of all the obligations would aggregate the sum of 57,802*l.* 6*s.* 6*d.*"

These three sums together amounted to 218,734*l.* 0*s.* 11*d.*

The order of the Court of Appeal of August 9, 1894, contained the following:—

"This Court, being of opinion that the scheme set out in the petition is for the benefit of all the holders of the obligations" of the railway company "who are not parties to the proceedings, doth order that the said scheme be carried into effect so as to be binding on all the holders of the outstanding obligations of the railway company other than" three named persons "who dissent."

It was ordered that all further proceedings in the actions under the judgment of January 27, 1893, should be stayed. It was further ordered that the defendant commissioners should set aside out of the moneys in their hands 600*l.* to answer any claims of the three dissentient holders of obligations who together held 150 obligations. It was also ordered that the commissioners should pay in respect of the 61,383 obligations of the company to the holders of those obligations, 2*l.* 10*s.* for each obligation upon the presentation thereof, together with all unpaid coupons, and delivery up thereof for cancellation. It was further ordered that the commissioners should out of the funds in their hands set aside 18*s.* 10*d.* in respect of each of the 61,383 obligations so delivered as aforesaid.

Lastly, the order provided that "any of the parties are to be at liberty to apply for the purpose of carrying into effect the scheme as modified and sanctioned by this order, and generally as they may be advised."

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After this order had been made a large number of the holders of the obligations surrendered their obligations in exchange for 2*l.* 10*s.* per obligation, and ultimately there remained outstanding only 1700 obligations. Advertisements had been frequently issued in various newspapers in England and abroad, but the holders of the 1700 obligations had not been ascertained. The balance of the funds in the hands of the commissioners had been paid into court in the actions, and there remained in court a fund more than sufficient to pay 2*l.* 10*s.* in respect of each of the 1700 obligations.

Under these circumstances the railway company on February 20, 1901, gave a notice of motion in the three actions, asking for an order that a period of three months, or such other time as the Court might think fit, might be limited within which the holders of the obligations must come in under the provisions of the scheme and accept the sum of 2*l.* 10*s.* per obligation under its provisions, and that the holders of such obligations who should not come in under the provisions of the scheme and accept the sum of 2*l.* 10*s.* per obligation in pursuance thereof within the time so limited must be deemed to have elected not to take the benefit of the scheme, but to rely on the charge on the railway property comprised in or charged by the said obligations, and that such holders might be excluded from the benefit of the scheme and the order of August 9, 1894. The notice of motion was addressed to the plaintiffs in the first action.

Upjohn, K.C., and *Martelli*, for the company. This application is made under the liberty to apply which was reserved by the order of August 9, 1894. In cases under s. 161 of the Companies Act, 1862, when a company has resolved on a voluntary liquidation for the purpose of reconstruction by means of a sale of the assets to a new company, it has been held that a time may be properly limited within which a shareholder in the old company must apply for shares in the new company: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1), and also that, even if no time is limited, a shareholder must

(1) (1889) 43 Ch. D. 452.

exercise his option within a reasonable time: *Zuccani* v. *Nacupai Gold Mining Co.* (1) It would not be fair in the present case, nor could it have been in the contemplation of the parties, that a bondholder should be allowed to stand out for an indefinite time in order to see whether it will be more to his advantage to accept the terms of the compromise or to rely upon his original security. The bondholders who do not come forward within a reasonable time ought to be deemed to have elected not to accept the compromise, and the fund now remaining should be handed over to the company for the purposes of the undertaking. Six years have elapsed since the Court sanctioned the compromise, and it would be reasonable that a period of three months should now be fixed within which the remaining bondholders must make their election.

Butcher, *K.C.*, and *Peterson*, for the plaintiffs, were not called upon.

RIGBY L.J. As the majority of the Court are of opinion that we ought not to make any order on this motion, we shall not call upon the respondents' counsel, who do not, as it seems to us, in any sense represent the absent bondholders.

The application is made by the railway company to alter, as it seems to me, the form of the order approving a compromise which was made by the Court of Appeal under the jurisdiction vested in them by Order XVI., r. 9A, which gives the Court the extraordinary power (which I grant may be a very useful power indeed) to bind absent persons who have had no opportunity of seeing the terms of the compromise, of bringing forward their own views on the subject, or, indeed, of even knowing that a compromise has been suggested. It is, as I have said, an extraordinary power, though I do not for a moment venture to say that the power may not be very usefully exercised by a Court of law, which, of course, is absolutely equal between the parties present and absent. It may be very desirable that such a power should be vested in the Court, especially in those cases in which alone, I suppose, it would be exercised, namely, cases in which the great majority of the persons who are in the same

(1) (1889) 61 L. T. 176.

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position as the absent persons whom it is sought to bind are of opinion that the compromise is a beneficial one for themselves, and therefore for the persons who, though they are absent, have similar interests.

I do not think I need go in detail into the matter, but I gather that this railway company, having a considerable scheme for the construction of railway lines in Spain, borrowed money on the security of obligations or bonds, the security given by them being upon the whole of the lines so intended to be made, which were no doubt described to the persons who were invited to advance their money in glowing and tempting terms. The railway company failed absolutely to carry out the whole of the scheme which it had represented to the bondholders that it intended to carry out, in so much that it was alleged that a sum of money, part of that which had been advanced by the bondholders and which was in the hands of the commissioners of the company in London, was practically the only source, or the only important source, for the repayment of the bondholders, and that they must look in fact to the money which they had themselves advanced to obtain a partial repayment of what they had advanced. Under these circumstances the matter came before North J. in *Collingham* v. *Sloper*, the defendant Sloper being one of the commissioners in whose hands the moneys were. North J. made an order, which it is said was without precedent. It may none the less have been a right order—I am not in a position to form an opinion about that. The order was appealed from, and while it was under appeal a scheme of compromise was suggested, and an application was made to North J. under Order XVI., r. 9A, for his approval of the compromise. He declined to approve it for reasons which we do not know, and it is not important to inquire into them. The matter was then brought to this Court, which, on a consideration of all the facts, came to the conclusion that the compromise was one which could properly be sanctioned, and made an order sanctioning it and declaring it to be binding on the absent bondholders. The original order of North J. had, of course, no longer to be considered the subject of an appeal, and the proceedings under

it were, in fact, stayed. The scheme of compromise completely settled the rights of the bondholders and it became binding on all the bondholders, present or absent, with the exception of three dissentients. Since that time a great number of the bondholders—many of them no doubt present, and knowing of and sanctioning the compromise so far as their individual rights were concerned—have come in and have been paid under it. Some of the bondholders who have thus come in were strangers to the making of the order. They have come in slowly, and probably as they happened to learn for the first time of the compromise, or it may be when they had made up their minds to come in under it. They have come in slowly, and yet they have not ceased to come in until the present time, for I understand that in the present month, probably through the medium of bankers or financial agents abroad, holders of between 2000 and 3000 bonds have come in, and are now asking for payment under the compromise. Although, therefore, the operation of the order has been slow, it cannot be said to be as yet entirely at an end, and we do not know what may yet take place. It is said that there is now a fund of about 5000*l.* left in court, and there are 1700 bonds still outstanding.

The important clause in the scheme which we have to consider is that which appropriates a fund of 153,457*l.* 10*s.* "for distribution in respect of the 61,383 obligations issued by the railway company when and as soon as the holders thereof shall be duly ascertained (being at the rate of 2*l.* 10*s.* per obligation) within fourteen days after presentation of the same for payment, upon such obligations being delivered up to be cancelled." I regard that as a sum which is to be set aside and to be distributed when and so soon as the holders of the bonds shall be duly ascertained. The holders of 1700 bonds have not been ascertained. What right has any one to say, "We will do away with that condition, which is a condition precedent to payment, and set the fund free before those holders are ascertained"? Then there are the words "within fourteen days after presentation." It may be that when a bondholder has been ascertained, when it is known who and where

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he is, and when an intimation of his rights under the scheme has been given to him, there may be a right to come to the Court—I do not say that on the construction of the agreement there would be—but there may be a right to call upon him either to present his bond for payment and deliver it up in return for payment of 2*l.* 10*s.*, or the Court might say to him, "You must come in within a reasonable time." But I cannot conceive with what justice the railway company can now say, "Fix a reasonable time." How can a reasonable time be fixed in the case of a man who is not ascertained, and of whom we know nothing? We only know that there is a bond distinguished by a certain number, and we cannot tell who is the owner of that bond. How is it possible to fix a reasonable time for the holder of that bond to come in? That, as it seems to me, is all which is necessary for the decision of this case. The responsibility in the first place of making an order sanctioning the compromise is very considerable, but it is a mere nothing, as it appears to me, compared with the responsibility which the Court would incur, if it should, upon an argument necessarily in many respects less exhaustive than that which might have been presented to the Court of first instance, undertake to alter the whole scheme. The Court has said, and I will assume that it has justly and rightly said, this is a proper scheme by which to bind absent bondholders. Can we now say that which the Court of Appeal in sanctioning the scheme did not express? Shall we imply in the order words which we cannot find in it—words indeed which may be conclusively shewn to have been purposely omitted from it, because the whole scheme is to take effect only when and so soon as the holders of the bonds are ascertained? For my part I decline to assume such a responsibility. I dare say it may happen that a few thousand pounds will be locked up. Why should they not, even if there be the merest possible chance that other bondholders will come in? What right or equity has this defaulting railway company to insist upon such a term being for the first time introduced into the scheme? In my opinion it has absolutely no such right, and if it should happen that for a very considerable time the

money is locked up, I cannot see that there will be any injustice. I think the company have escaped from the effect of their default in a very easy fashion, all things considered— the expense of their default has been to a very considerable extent borne by the bondholders and not by themselves, and I am not at all disposed, even if I felt myself justified in so doing, to make an order simply because it would be convenient to them and would be pecuniarily profitable to them. In my judgment, therefore, no order should be made on this motion.

VAUGHAN WILLIAMS L.J. I am sorry that I cannot quite agree. It is not necessary, nor would it be convenient for me to consider, what would be a reasonable time as regards those absent persons who by the order of the Court are bound by the compromise, because, as I understand the view expressed by my brother Rigby, the Court has no power to fix a time. Nor will I trouble myself with the question whether it is to the interest of the community that a sum of money should remain for an indefinite time locked up in court because of a difficulty in ascertaining who are the persons entitled to certain interests in it. There the difficulty is, and there it must remain until the Legislature thinks fit to remove it. To my mind what I have to do is to construe this order, or, in other words, to construe this agreement of compromise, for the scheme has been sanctioned by the Court and it should be carried out. We have to see whether, according to the proper construction of the scheme, these bondholders, who had the option of coming in and of receiving out of the fund 2*l.* 10*s.* for each bond, are entitled to wait as long as they choose before exercising that option. In my view of the construction of the order they have not that right. If they had that right under the order I do not think the Court would have any power to modify it or alter it.

Now, the compromise is the same both for those bondholders who did assent to it, those who were present and were bound by it, and for those who, though not present, were bound by the order of the Court made under the jurisdiction conferred by Order XVI., r. 9A. Those absent persons are

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bound by the order and by the compromise which is sanctioned by it. The question is, What does the compromise mean?

I will take first those persons who were present when the order was made, but who have not elected to come in under the scheme. Have they an unlimited time in which to make up their minds? If notice were given to such persons at the end of six years, that if they did not come in within a further period of twelve months it was intended to apply to the Court to allow the money to be taken out, would such a person be entitled to say, "By the terms of this compromise no time whatever is limited. Nothing is said about my coming in within a reasonable time. I have not yet made up my mind, and I insist upon my rights." I cannot conceive that as against such a person the Court would not say that in this contract, as indeed of necessity in every contract in which time is not expressed, the law implies a reasonable time for its fulfilment. And it seems to me that if there are bondholders who were absent when the order was made, but who are now in this country and are ascertained, it could be said as against them also, "You must come in under this scheme within a reasonable time." So also it seems to me that in the case of persons who are still absent and unascertained, they too must come in within a reasonable time. The only reason why I have felt any doubt as to the propriety of reading into this scheme the implication of a reasonable time is, first, that it may be said, "This is not a mere agreement; it is an order of the Court, and this implication does not apply to an order of the Court." I have great doubt about this, because the other members of the Court do not agree with me. Still I think that, even when the Court sanctions a compromise, you ought to read into it a "reasonable time." Again, it may be said that here another condition is expressed in terms, namely, "as soon as the holders thereof shall be duly ascertained," and, though you may imply a "reasonable time" in an ordinary contract, the reasonable time cannot, in this case, begin to run as against persons who have not been ascertained, and that in each case the obligation would not arise until the individual had been ascertained. I do not feel constrained to exclude

what I call the necessary implication of a reasonable time by these words, because, as it seems to me, the words which follow, "within fourteen days after presentation," remove the difficulty, for they import that the presentation must be made within a reasonable time. If I am asked what is a reasonable time for an unascertained person, my answer is that it is not to the interest of the community that these bondholders should sleep upon their rights for an indefinite time. People must act reasonably in these matters, and if for such a long period they do not choose to come forward and take the benefit of an order which has been advertised throughout the length and breadth of the civilised world, the law will presume that those notices reached them, and will make the time run from the date at which it must be reasonably presumed that the notices reached them. I will say nothing as to what the terms of the order should be, because the majority of the Court consider that there is no power to make an order.

STIRLING L.J. I regret to find myself differing from my brother Vaughan Williams, but I do not think that we have any right to make an order against unascertained holders of outstanding bonds. It is quite true that in some cases the Legislature has by Statutes of Limitation deprived of their rights persons who do not assert those rights. But here no Statute of Limitations applies. The scheme which we have to consider was made with the sanction of the Court, and I apprehend that, in sanctioning such a scheme, the Court would be very careful to see that it did not, in dealing with the rights of absent parties, deprive any absent person of his property in a case in which the Legislature has not said that he should lose it. It is by no means universally true in this country that persons who sleep on their rights are deprived of their property. A very strong example of that is to be found in the tender regard which the Legislature has always paid to the rights of holders of Government stock who do not come forward to claim their dividends. That is familiar to all who practise in the Chancery Division, and I think it is to such an example, rather than to a Statute of Limitations, that

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regard ought to be had in forming and sanctioning such a scheme as this. I am speaking of the general policy of the Court in dealing with such schemes. By the scheme now before us a fund is set apart for distribution in respect of 61,383 obligations issued by the company (at a certain rate per obligation), "when and as soon as the holders thereof shall be duly ascertained, within fourteen days after presentation of the same for payment." That seems to me to imply that the fund shall be set apart and distributed amongst the holders of the obligations, and that each holder is, first, to be ascertained, and, secondly, to have an opportunity of presenting his obligation. I do not differ from the Lord Justice in thinking that when once a holder is ascertained it would be in the power of the Court to make him exercise his option. In such a case the company might serve him with notice, and ask the Court to say that, in default of his making a choice within a limited period, the fund should be paid out to the company. That course, I think, might be justified on the footing that when a person has abstained from electing to accept a benefit which he has a right to claim he should be assumed to have adhered to his original rights—to have chosen to stand upon his bond rather than to take the benefit which is given by the scheme. But I cannot think it right that that assumption should be applied until the bondholder has been ascertained, and has had an opportunity of considering his position and electing accordingly. In my opinion, on the true construction of this scheme, we have no right to take away from any bondholder who has not been ascertained the fund which is provided for him. For these reasons I agree with Rigby L.J. that no order ought to be made on this motion.

Solicitors: *Francis & Johnson; Huxham & Rawlinson.*

W. L. C.

ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL.

[1899 A. 1118.]

C. A.
1900
COZENS-HARDY J.
March 21, 22; *April* 6.
C. A.
1901
Feb. 26, 28.

Corporation—County Council—Municipal Corporation—Common Law Corporation—General Powers — Statutory Powers — Tramway Business — Municipal Trading—Omnibus Business—Ancillary Business—Incidental Powers—Ultra Vires—Attorney-General, Action by—Ratepayers—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 10, *sub-s.* 1—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 1, 2, 68, 79—*London County Tramways Act*, 1896 (59 & 60 *Vict. c. li.*), *ss.* 2, 10—*London Tramways Company (Limited) Act*, 1896 (59 & 60 *Vict. c. clxxxix.*), *s.* 31—*London County Council (Vauxhall Bridge Tramways) Act*, 1896 (59 & 60 *Vict. c. ccxi.*), *s.* 21.

A county council, being incorporated under s. 79 of the Local Government Act, 1888, is a purely statutory body, and does not possess, under s. 2 of that Act coupled with s. 10, sub-s. 1, of the Municipal Corporations Act, 1882, the wide powers of a municipal or common law corporation.

Consequently, where a county council had statutory powers to own and work "tramways" only:—

Held, by the Court of Appeal, affirming Cozens-Hardy J., that the council was acting ultra vires in becoming omnibus proprietors and running omnibuses as feeders to the tramways, the omnibus business not being covered by the council's statutory powers as being a business by necessary implication incidental or ancillary to the tramway business:

Held, also, by the Court of Appeal, that an action for injunction was properly brought in the name of the Attorney-General by rival omnibus proprietors who were also ratepayers in the county.

THE plaintiffs in this action were the Attorney-General, at the relation of a large number of proprietors of London omnibuses, and the proprietors of the omnibuses, who were ratepayers in the county of London. The plaintiffs claimed a declaration that the defendants, the London County Council, were not entitled to carry on the business of omnibus proprietors and to run omnibuses along any of the streets, roads, or highways within the county of London, and that in doing so, as it was alleged they were doing, they were acting ultra vires; also an injunction against their doing the acts complained of; and, in the alternative, a declaration that it was beyond the powers of the defendants to expend or use the county fund,

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or any other fund belonging to the ratepayers of the county of London or derived from the rates of the county, for the purpose of purchasing, maintaining, or running omnibuses, horses, and plant, or paying servants necessary for carrying on the business of omnibus proprietors in any part of the county of London, and that in using public moneys for that purpose the defendants were acting ultra vires; and an injunction restraining the defendants from carrying on the business of omnibus proprietors and from using any such fund as aforesaid for that purpose.

Under the powers of the London Tramways Company, Limited (Purchase) Act, 1873, and of their memorandum and articles of association, the London Tramways Company, Limited, purchased the tramway undertakings of various metropolitan tramway companies.

The company's memorandum of association originally stated, as the main object of the company, the acquisition and working of London tramways; but subsequently, in 1891, the company obtained an order of the Chancery Division under the Companies (Memorandum of Association) Act, 1890, amending their memorandum by extending their objects to "the carrying on of the business of omnibus proprietors in connection with any tramways of the company," and the purchase of omnibuses, horses, and other things useful for carrying on any business the company were authorized to carry on.

A terminus of one tramway of the company was near the south end of Blackfriars Bridge; a second terminus was near the Surrey end of Westminster Bridge; and a third terminus was about a quarter of a mile south of Waterloo Bridge near Waterloo Railway Station. Under the extended powers of their memorandum the company proceeded to run, as feeders to their tramways, three lines of omnibuses at halfpenny fares for all or any part of the distance. One line ran from the first-mentioned terminus over Blackfriars Bridge to a point in Farringdon Street near the station on the Metropolitan Railway, and back; a second from the secondly-mentioned tramway terminus over Westminster Bridge, up Whitehall to Charing Cross, and back; and the third from the thirdly-mentioned tramway terminus over Waterloo Bridge to the

entrance into the Strand near the west side of Somerset House, and back.

The defendants, the London County Council, were incorporated by the Local Government Act, 1888 (51 & 52 Vict. c. 41).

By s. 31 of the London Tramways Company (Limited) Act, 1896 (59 & 60 Vict. c. clxxxix.), it was enacted that "the company"—the London Tramways Company, Limited—"on the one hand and the London County Council on the other hand may from time to time enter into and carry into effect agreements with respect to the purchase by the said county council of all or any tramway or tramways for the time being belonging to the company, whether the same have been opened for traffic or not, including any works and property connected therewith, and including any tramways authorized but not constructed, and the powers, rights, authorities, obligations, and privileges of the company in relation thereto . . . . on such terms and conditions as may be agreed between the company and the said county council . . . . but nothing in any such agreement shall transfer to the county council any powers of working tramways."

In pursuance of that section an agreement dated December 27, 1898, was entered into by the company with the defendants, the London County Council, by which the company agreed to sell to the defendants, at the price of 850,000*l.*, all the tramways which had been purchased by and belonged to the company, and also, under the head of "the remainder of the undertakings and property of the company," the company's omnibuses, horses, and plant, but not the goodwill of the omnibus business. Thereupon the defendants forthwith took over the whole of the tramways, omnibuses, horses, and plant. The tramways they proceeded to work in the same way that they had been worked by the company, and as they claimed that their purchase included the power to run the omnibuses, they continued running the three lines of omnibuses, at halfpenny fares, in the same way the company had done, as feeders to the tramways, except that, instead of the two short omnibus services over Westminster Bridge to Charing Cross and back,

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and over Waterloo Bridge to the Strand and back, they combined the two in a single service over Westminster Bridge to Charing Cross, thence along the Strand and over Waterloo Bridge and back. The defendants alleged that this mode of working was more economical, and brought a larger amount of business to the tramways, and that it had been found to be a great convenience and advantage to the public—especially as the whole route could be traversed at a halfpenny fare, a lower fare than was charged by other omnibus proprietors—and was therefore very popular as well as lucrative to the defendants and to the ratepayers. For the purpose of their omnibus services the defendants purchased additional omnibuses, and horses and plant.

The plaintiffs contended that the defendants had no statutory powers to run omnibuses but only to work tramways, and accordingly brought this action, claiming the relief above stated. The defendants, on the other hand, insisted that in running omnibuses they were not acting ultra vires, but that their statutory powers enabled them to do all things necessary and proper to promote the success of the tramways and undertaking formerly carried on by their vendors, the tramways company.

With reference to the plaintiffs' alternative claim for a declaration that the defendants had no power to use the county fund or any other fund derived from the rates for the purpose of running omnibuses, it appeared that the defendants had a balance of revenue available for the purpose without the necessity of resorting to the rates.

The defendants' powers of working the tramways purchased by them were contained in the London County Tramways Act, 1896 (59 & 60 Vict. c. li.), which recites as follows:—

"Whereas under powers contained in the London Street Tramways Act, 1870, the London County Council (in this Act called 'the council') have purchased the undertaking of the London Street Tramways Company thereby authorized, and all lands, buildings, works, material, and plant of the said company, and under that Act all the rights, powers, and authorities of the said company in respect of the undertaking sold

are transferred to, vested in, and may be exercised by the council in like manner as if the council had been named in that Act instead of the said company. And whereas there are in force within the county of London other local Acts authorizing tramway undertakings (all or some of which are mentioned in the schedule to this Act) under and by virtue of which Acts the council have, or claim to have, powers to purchase at the expiration of certain periods the several tramways and undertakings thereby respectively authorized, so far as they are within the county of London, but some of the said Acts confer no powers on the council for the working of the said tramways after they have been purchased. And whereas the council are proceeding to give effect to the powers of purchase so conferred upon them with respect to the tramway undertakings authorized by the Acts and provisional orders mentioned in Part II. of the schedule to this Act. And whereas it is expedient that powers such as are in this Act contained should be conferred on the council for the working of the tramways authorized by the local Acts mentioned in the schedule to this Act as and when such tramways are acquired by the council."

Then follow these enactments:—

Sect. 2: "It shall be lawful for the council to exercise with respect to any tramways authorized by the local Acts mentioned in the schedule to this Act, which have been or shall be purchased or acquired by them under their statutory powers, the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the council may provide, place, and run carriages thereon, and provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them."

Sect. 10: "All costs and expenses of the council in the execution of this Act (except so far as they may be otherwise provided for by this or any other Act) shall be defrayed as payments for general county purposes within the meaning of the

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Local Government Act, 1888, and the costs, charges, and expenses preliminary to and of and incidental to the preparing, applying for, obtaining, and passing of this Act shall be paid by the council in like manner."

By the London County Council (Vauxhall Bridge Tramways) Act, 1896 (59 & 60 Vict. c. ccxi.), an Act to enable the London County Council to construct tramways over Vauxhall Bridge, it is enacted by s. 21 as follows:—

"The council shall cause accounts to be kept of their receipts and expenditure in connexion with tramways, to which all receipts arising from tramways shall be carried and out of which all payments in respect of tramways shall be made, and if and so far as the tramway revenue shall be insufficient to cover the expenses of maintenance and management and of providing for the requisite payments to the consolidated loans fund in respect of money raised or expended for the purpose of tramways, the deficiency shall be from time to time defrayed as payments for general or special county purposes, as they may decide, within the meaning of the Local Government Act, 1888, and any balance of tramway revenue over expenditure shall, at such times as the council direct, be carried to the general or special county account of the county fund."

G. I. F. C.

The action came on for trial before Cozens-Hardy J. on March 21, 1900.

Asquith, *Q.C.*, *Hon. E. C. Macnaghten*, *Q.C.*, and *Blaiklock*, for the plaintiffs. The county council can only justify the use of their public funds for an object outside their general purposes, such as running omnibuses, by reason of an express statutory enactment, or because the object is authorized by necessary implication. This object is not authorized by either any general Tramways Act or by any special Act giving the county council powers in connection with the working of tramways. There are sections conferring powers in several of the Acts, but none of them go beyond the London County Tramways Act, 1896. If the council have any power, it can

only be by virtue of s. 2 of that Act, which enables them to work the purchased tramways.

The running of these omnibuses is an entirely separate business, and is not merely ancillary to the working of the tramways. It is said that these omnibuses act as feeders to the tramways—they may do so to some extent—and therefore are authorized by implication. If that doctrine were pushed to its logical end, it would allow the council to engross a large part of the omnibus business of London.

Haldane, Q.C., *Vernon Smith, Q.C.*, and *T. T. Methold*, for the defendant council. A corporation like this is not like a company confined to its main objects. The running of these omnibuses is very beneficial to the public; the Court will construe instruments conferring powers on a municipal corporation more favourably than a memorandum of a private company, which exists merely for the purpose of gain: *Galloway* v. *London Corporation* (1); *Attorney-General* v. *Great Eastern Ry. Co.* (2)

The running of these omnibuses is not expressly prohibited; it is fairly incident to the proper and profitable working of the tramways authorized to be worked by the Act of 1896.

Asquith, Q.C., in reply, in substantiation of the general principle that the council could not carry on the business without statutory power, referred to *Reg.* v. *Reed* (3); *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (4); *Attorney-General* v. *Great Eastern Ry. Co.* (5)

Cur. adv. vult.

1900. April 6. COZENS-HARDY J. This is an action by the Attorney-General on the relation of a large number of the omnibus proprietors of London against the London County Council, seeking a declaration that it is beyond the powers of the London County Council to carry on the business of omnibus proprietors in connection with their tramways, or to apply the county fund for the purpose of maintaining and working

(1) (1866) L. R. 1 H. L. 34.
(2) (1879) 11 Ch. D. 449; (1880) 5 App. Cas. 473.
(3) (1880) 5 Q. B. D. 483, 488.
(4) (1889) 23 Q. B. D. 492, 497.
(5) 11 Ch. D. 482.

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omnibuses, and for consequential relief. It was argued that the Court ought not to apply the doctrine of ultra vires to a public body such as the London County Council, but it seems to me that there is no foundation for this contention. The county council is a body created by statute, and to every such statutory creation the language used by Lord Blackburn in the House of Lords with reference to a railway company in *Attorney-General* v. *Great Eastern Ry. Co.* (1) applies: "Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited." And Lord Watson (2) uses almost the same language. This principle was applied to the School Board for London in *Reg.* v. *Reed* (3), and I think it must be applicable to the London County Council in their character of owners of the tramways. The question is, however, of an academical character, for the jurisdiction of the Court to restrain the application of public funds to unauthorized purposes, apart from the doctrine of ultra vires, is too well established to admit of dispute, and it was not challenged before me: see *Newcastle-upon-Tyne Corporation* v. *Attorney-General.* (4) It was also urged that the Court ought to give a more liberal construction to the powers conferred upon a public body for the public benefit than it is in the habit of giving to similar powers claimed by companies trading for gain. I am not satisfied that this distinction is well founded. In each case a reasonable construction ought to be put upon the language of the document conferring the powers, whether it is a statute, or a charter, or a memorandum of association. Tramways are made by virtue of special Acts or provisional orders, and Parliament has, when the promoters are not the local authority, given to the local authority a power of compulsory purchase of "the tramway and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking within the district." This power can only be exercised on notice at the expiration of certain

(1) 5 App. Cas. 481.
(2) Ibid. 486.
(3) 5 Q. B. D. 483.
(4) [1892] A. C. 568.

periods of years and upon terms of payment which have been the subject of litigation, but which are not material for the present case. The London County Council are the local authority for this purpose. The local authority has in general no power to work any tramways they may purchase. [His Lordship read the recitals and sections of the London County Tramways Act, 1896, set out above, and continued :—]

Before this Act of 1896, the county council had no power to work tramways which they might purchase, and both before and after that Act they could only purchase tramway undertakings. For example, they could not purchase the whole of the undertaking of the limited company which owned in 1896 the tramways mentioned in the schedule to the Act of 1896, and whose objects, as defined by its memorandum of association, extended beyond the owning and working of tramways.

The actual terms of purchase were settled by an agreement dated December 27, 1898. From the beginning of 1899 the London County Council have worked the purchased tramways. The tramways, to which alone my attention has been called, are three on the south side of the Thames. The county council run omnibuses from the south side of Blackfriars Bridge, where one tramway ends, across the bridge to Farringdon Street, and vice versâ. They also run omnibuses from the south side of Waterloo Bridge, where a second tramway ends, across Waterloo Bridge, along the Strand, down Whitehall, and across Westminster Bridge to the place where a third tramway ends, and vice versâ. A halfpenny fare is charged for each omnibus journey or part of a journey. The question I have to decide is whether it is competent to the county council to run these omnibuses. It is admitted that moneys raised by or on the security of rates have been applied for the purchase and working of the omnibuses. My attention has been called to a number of statutes, but in the result it seems that the county council can only justify their action by reference to s. 2 of the Act of 1896. It is said, and I have no doubt with truth, that it is convenient to passengers by the tramways to have a cheap conveyance to the north side of the Thames and along the Strand. I do not doubt that the traffic on the tramways is

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increased by reason of these omnibuses. The course adopted by the county council in this respect is that which was followed by the limited company, the former owners of the tramways, except that the limited company did not run omnibuses along the Strand, but only ran omnibuses across each of the three bridges and back. The word "convenient" occurs twice in the section—"Convenient for enabling the council to exercise such powers," and "convenient for working the tramways." In neither place does it mean convenient to the public or for the advantage of the public.

The tramways which alone the county council were empowered to purchase have certain definite limits at the southern and northern ends. Within those termini the county council may, in the language of the section, "work" the tramways and convey passengers in tramcars. There are many things fairly incidental to this which they may do, and, indeed, must do. They may have stables and sheds for their horses and cars, they may have carts and horses to convey forage to their stables. In short, anything reasonably proper for the "working" of the tramways is within their powers. Anything not falling within this definition is outside their powers. It seems to me that the London County Council are really carrying on a separate and distinct business as omnibus proprietors. They do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the Act of 1843, for regulating hackney and stage carriages in and near London, they are bound to take any passenger who desires a ride and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in the streets of London is certainly not expressly authorized by the Act of 1896, and, in my opinion, it is not impliedly authorized. It is not for me to consider whether the business of omnibus proprietors is one which may conveniently or advantageously be combined with the business of working the tramways. Parliament has, in the Companies (Memorandum of Association) Act, 1890, recognised this as a ground for altering and enlarging the memorandum of association of a company. The Act of 1890 has, of course, no direct application to the present case.

I refer to it only as a statutory recognition of the doctrine that, however convenient or advantageous may be the combination of a new business with an authorized business, such combination or connection may nevertheless be ultra vires. The result is that I must make a declaration in the terms of the claim, and I will give liberty to apply. The defendants must pay the costs of the action. I do not propose to grant an injunction unless the plaintiffs insist upon it.

D. P.

C. A.

The defendants, the London County Council, appealed.

The appeal was heard on February 26, 28, 1901.

Haldane, K.C., Vernon Smith, K.C., and *T. T. Methold*, for the appellants, the London County Council. The policy of the Legislature under the Tramways Act, 1870 (33 & 34 Vict. c. 78), was to refuse municipal authorities the power of working tramways; but that was repealed in many instances, and in 1896 it was repealed by the London County Tramways Act, 1896, in the case of the London County Council, who can, therefore, not only own but also work tramways. First, we contend that the county council had power to purchase the omnibus plant under the words in s. 31 of the London Tramways Company (Limited) Act, 1896, "including any works and property connected therewith"—that is, connected with the "tramways." Then, with regard to the power of "working" the omnibuses, we submit that that power is given by s. 2 of the London County Tramways Act, 1896, which enables the council not only to work the "tramways," but also to provide such "cars" as may be "requisite or convenient" for enabling them to exercise their powers of working the tramways. These omnibuses, or "cars," are undoubtedly requisite and convenient for the efficient working of the tramways, and are, moreover, found to be of benefit and advantage to the ratepayers and inhabitants of London generally. Again, the "county fund" section in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68 (1),

(1) In the Local Government Act, 1888 (51 & 52 Vict. c. 41), the first two sections are headed "Constitution of County Council," and by s. 1 it is enacted that "a council shall be established in every administrative county."

Sect. 2, sub-s. 1: "The council of

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is not applicable to these London tramway undertakings at all, the receipts and expenditure in connection with them being

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a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act, and in particular to the following provisions."

Sub-ss. 2 to 6 of the same section deal with the qualification and status of aldermen and councillors, the number of councillors, electoral divisions, electors of councillors, the position of chairman, and the appointment of vice-chairman. Then follow a group of sections, 3 to 19, dealing with the "Powers of County Council."

Sect. 68, sub-s. 1: "All receipts of the county council, whether for general or special county purposes, shall be carried to the county fund, and all payments for general or special county purposes shall be made in the first instance out of that fund."

Sub-s. 2: "In this Act the expression 'general county purposes' means all purposes declared by this or any other Act to be general county purposes, and all purposes for contributions to which the county council are for the time being authorized by law to assess the whole area of their administrative county, and the expression 'general county account' means the account of the county fund to which the contributions so raised are carried, and any costs incurred for a general county purpose shall be general expenses, and all costs incurred by the county council in the execution of their duties which are not by law made special expenses shall be general expenses."

Sub-s. 3: "In this Act the expression 'special county purposes' means any purposes from contribution to which any portion of the county is for the time being exempt, and also includes any purposes where the expenditure involved is by law restricted to a hundred, division, or other limited part of the county, and the expression 'special county account' means any account of the county fund to which contributions for special county purposes are carried, and any costs incurred for a special county purpose shall be special expenses."

Sub-s. 4: "If the moneys standing to the general county account of the county fund are insufficient to meet the expenditure for general county purposes, county contributions may be levied to meet the deficiency on the whole administrative county, and shall be assessed on all the parishes in the county."

Sub-s. 5: "If the moneys standing to any special county account of the county fund are insufficient to meet the expenditure for the special county purposes chargeable to that account, county contributions may be levied to meet the deficiency on any parishes in the county liable to be assessed to county contributions for those purposes."

Sect. 79, sub-s. 1: "The council of each county shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have perpetual succession and a common seal and power to acquire and hold land for the purposes of their constitution without licence in mortmain."

regulated by the general section—s. 21—of the London County Council (Vauxhall Bridge Tramways) Act, 1896, a section which, we submit, is applicable, not only to the tramway undertakings, but to any undertaking connected therewith.

Again, the county council are not acting ultra vires, so long as they do not transgress their statutory powers: *Newcastle-upon-Tyne Corporation* v. *Attorney-General* (1); *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) Even if the statutes under which the council have acquired and are working their tramways do not authorize them in express terms to carry on the omnibus undertaking, it should be treated as within their statutory powers as being a reasonable and proper, and therefore legitimate, incident to the tramways undertaking: *Attorney-General* v. *Great Eastern Ry. Co.* (3); *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2); *Galloway* v. *London Corporation.* (4)

Again, even assuming that the omnibus undertaking is ultra vires of the council, the Attorney-General cannot, as representing the public, interfere at the relation of a body of persons who are merely trade rivals to the council, unless it can be shewn that the council are doing some public wrong, such as resorting to the rates: *Attorney-General* v. *Great Eastern Ry. Co.* (5) Here the council are conferring a public benefit by their omnibus services, and they are not resorting to the rates for the maintenance of those services, nor is it necessary for them to do so.

Then the last point, and it is one on which we strongly rely, is this—that, even if the council have no statutory authority to carry on this omnibus undertaking, yet they are in a position analogous to that of a municipal corporation, and are not a mere statutory body whose powers do not lie beyond the ambit of their statute. And this view is, we submit, supported by the provisions of the Local Government Act, 1888, when properly construed. Under s. 2, sub-s. 1, of that Act the council are to be constituted "in like manner, and be in the

(1) [1892] A. C. 568.
(2) (1875) L. R. 7 H. L. 653.
(3) 11 Ch. D. 449; 5 App. Cas. 473.
(4) L. R. 1 H. L. 34.
(5) 11 Ch. D. 449, 470, 479.

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like position in all respects, as the council of a borough." What then is the position of the council of a borough? Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), they can exercise all the powers of a municipal corporation, for s. 10, sub-s. 1, says: "The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this Act or otherwise." Now, a municipal corporation is the creation, not of a statute, but of a royal charter; and the grant of a charter of municipal corporation is still an exercise of the common law prerogative of the Crown, notwithstanding the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76): Grant on Corporations, p. 16; *Rutter* v. *Chapman*. (1) Being then a common law corporation so created, it can do with its property all such acts as an ordinary person can do with his own, and is not limited in the exercise of its powers as a statutory corporation is by its statute: *Sutton's Hospital Case* (2); *Riche* v. *Ashbury Railway Carriage and Iron Co.* (3); *Baroness Wenlock* v. *River Dee Co.* (4)

[VAUGHAN WILLIAMS L.J. It is stated in Chitty on the Prerogatives of the Crown, p. 124: "Nor is it necessary that the charter should expressly confer those powers, without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property; though such powers are in general expressly given."]

Sutton's Hospital Case (2) lays it down clearly that when a corporation is once created by royal charter it has the same absolute power of dealing with its property as a private individual has: there is, therefore, no necessity to confer powers upon it in express terms. That being so, the doctrine of ultra vires does not apply to a municipal corporation: *Attorney-General* v. *Newcastle-upon-Tyne Corporation*. (5) Therefore, so long as the council are not resorting to the rates, they are acting within the general power allowed them by law.

Asquith, K.C., Hon. E. C. Macnaghten, K.C., and *Blaiklock*,

(1) (1841) 8 M. & W. 1.
(2) (1612) 10 Rep. 1 a, 30 b.
(3) (1874) L. R. 9 Ex. 224, 262–3.
(4) (1883) 36 Ch. D. 675, n., 685, n.
(5) 23 Q. B. D. 492; [1892] A. C. 568.

for the plaintiffs. With regard to the point that the county council are a municipal or common law corporation, our contention is that they are a creation of statute, and nothing more, and that they are therefore bound by the four corners of their statute. It is by s. 79 of the Local Government Act, 1888, that they are incorporated, and s. 2, sub-s. 1, says that, although they are in "the like position in all respects as the council of a borough," they are "subject nevertheless to the provisions of this Act." They, therefore, have no powers beyond what they get by statute, and they do not possess the wide powers of an old municipal corporation. Now, all that the council were authorized by s. 31 of the London Tramways Company (Limited) Act, 1896, to purchase was the company's tramway business, and nothing else. Omnibuses are not "works and property connected therewith," that is, with the tramways, and the working of omnibuses has no necessary relation to the working of tramways. The object of the council is simply to run a commercial undertaking; and, if they are right, there is nothing to prevent their running omnibuses all over London, on the pretence that they are doing what is incidental to the working of their tramways. The argument that what they are doing is for the public advantage was used in *Colman* v. *Eastern Counties Ry. Co.* (1), but was rejected as being unsupported by any authority. The running of omnibuses may be profitable and may be of public advantage, but that is not the question; the question is, Is this within the council's statutory powers? We submit that it is not. Then it is said that omnibuses are "cars," within s. 2 of the London County Tramways Act, 1896; but that is straining the meaning of the word. It simply means what are known as "tram-cars."

[VAUGHAN WILLIAMS L.J. "Car" is an Americanised term. The Americans, being a busy people and therefore apt to use the shortest words, call carriages "cars."]

There is no power for the council in any of their Acts, or in the Local Government Act, 1888, to carry on the business of omnibus proprietors. Then, as to their contention that they

(1) (1846) 10 Beav. 1.

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are not resorting to the rates for maintaining their omnibus services, if they are bound by s. 68 of the Local Government Act, 1888, then the whole of their receipts from those services must go into the "county fund," and the whole of their expenditure upon those services must come out of that fund, which fund includes contributions from rates. But if, as they contend, they are outside that section and come within the general s. 21 of the London County Council (Vauxhall Bridge Tramways) Act, 1896, then this latter section will not help them, for it deals only with "tramways," and has no bearing on anything alien to or outside tramways.

The case is, we submit, clearly one for the intervention of the Attorney-General as representing the public, since the defendants are charged with acting in excess of their statutory powers, and with doing what must involve resorting to the rates. Moreover, the plaintiffs are not merely rival omnibus proprietors, but are also ratepayers, and are entitled to sue as such.

[They also referred to *Reg.* v. *Reed.* (1)]

Haldane, K.C., in reply.

RIGBY L.J. The question raised in this case is as to the power of the London County Council to carry on the business of omnibus proprietors, not in general, but in respect of a particular line of omnibuses which in great part was used by the London Tramways Company, who were entitled, as the council's predecessors, to certain tramways which, under an Act of Parliament, the council are authorized to work; and the first question, or, at any rate, that which it will be convenient for us first to deal with, is the question as to the legal position of the London County Council. Now there is no doubt whatever that the London County Council are constituted by statute. They are, in fact, incorporated by s. 79 of the Local Government Act, 1888. Sect. 79 of that Act says: "The council of each county"—here the county of London—"shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have per-

(1) 5 Q. B. D. 483.

petual succession," and so on. Undoubtedly, therefore, so far, the London County Council are a statutory body, and not a common law corporate body at all. But it is argued by their counsel that s. 2 of the same Act provides that " the council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act."

Now the argument submitted to us is that the council of a municipal corporation has, by s. 10 of the Municipal Corporations Act, 1882, to perform the duties of the corporation, and that whatever the corporation can do is to be done by the council; and then it is said that municipal corporations are really creations, not of an Act of Parliament, but of royal charter in each individual case, and that, although their proceedings are regulated by Act of Parliament, that does not prevent them from being in effect corporations by royal charter, or corporations which may be otherwise called corporations at common law. Then it is further said that such corporations are not within the doctrine which was laid down for the first time in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), and subsequently in several cases, including *Baroness Wenlock* v. *River Dee Co.* (2), namely, that in the case of a statutory corporation you must find within the four corners of the Act of Parliament by which the corporation has been created something to justify the assumption of the power which it claims to exercise; and that if there be nothing in the Act to justify the assumption of such power, then the power does not exist. It is argued—and no doubt it is to a considerable extent true—that that doctrine does not apply to a corporation not created by Act of Parliament, that is, a corporation created by royal charter; and that, inasmuch as a municipal corporation is not within that doctrine, the council of a municipal corporation is able to do in the name and on behalf of the corporation many acts which are not included in any statute, and which are within the general powers of a common law corporation. Granted

(1) L. R. 7 H. L. 653. (2) 36 Ch. D. 675, n.

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that is the case, how does s. 2 of the Local Government Act, 1888, make a county council capable of exercising the same powers as the council of a municipal corporation? The provision is, not that the county council shall have the same powers and authorities that the council of a municipal corporation has, but that the county council "shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough." It is only those latter words that can possibly be said to give powers outside any statute. But are they intended to have so wide an effect? The section says, "in the like position in all respects," but "subject nevertheless to the provisions of this Act"—subject therefore to the provision in s. 79 creating the county council as a statutory corporation. That leaves the county council in a different position from the council of a borough, and is sufficient, in my opinion, to dispose of the argument that they are to be treated as "in all respects" in the same position. They are not to be so treated "in all respects," but they are to be "subject to the provisions of this Act"; so that wherever you find a provision in this Act dealing with the county council you must give effect to that provision, and regard the county council as standing in a position different from that of the council of a borough. That, I think, is quite sufficient to dispose of the suggestion that the county council can exercise common law powers of corporations created by royal charter because the council of a borough may do so. I hold, therefore, that s. 2 of the Local Government Act, 1888, does not enable the London County Council to exercise any powers other than those that are contained in and conferred upon them by statute, and has not the wide effect they seek to attribute to it.

Then the next question is, Have the London County Council, by any statute whatsoever, the power to run omnibuses, or the power to deal with omnibuses at all? We have been referred to the London County Tramways Act, 1896, which is an Act to enable the London County Council to work tramways, and for other purposes. Sect. 2 provides as follows: [His Lordship read the section, and continued:—]

Now, this section clearly enables, and was intended to

enable, the London County Council to work the tramways which were transferred to them under statutory powers; but it is said that at the time when the transfer took place—that is, the transfer authorized by the London Tramways Company (Limited) Act, 1896—the London Tramways Company, Limited, were possessed of omnibuses which were run in three directions, one being over Blackfriars Bridge to a point in Farringdon Street, one from Waterloo to the west side of Somerset House, and a third over Westminster Bridge to Charing Cross. It was accordingly argued that by virtue of this s. 2 the London County Council acquired the right of running, in the first place, the same tramways that were run by their predecessors, and in the next place the three lines of omnibuses that were also run by their predecessors. Now, those very predecessors commenced their existence as a tramway company only; but it having occurred to them that it would be convenient to run omnibuses as feeders to their main tramways they obtained, under the Companies (Memorandum of Association) Act, 1890, power to amend their memorandum of association so as to entitle them to run omnibuses. Then the company became possessed of—as one undertaking, no doubt—two separate and distinct sets of lines, one being the tramway lines and the other the omnibus lines, and they had, it is true, the power to use both. If the intention was, and if Parliament was disposed to accede to it, that the county council should take over and work the whole of the company's undertaking, including both branches, namely, the tramway branch and the omnibus branch, it would have been easy to say so in s. 2 of the London County Tramways Act, 1896. Nothing of the sort is said, and it is admitted that there is nothing in the section which clearly and specifically refers to a transfer of the whole undertaking and power to run both tramways and omnibuses.

It is said that the words of the section giving the council power to "provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the council to exercise" the powers of working the tramways are sufficient. I am of opinion that they are

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not. The suggestion was made that "cars" meant omnibuses, and not tramcars. I think that a little investigation leads to the conclusion that the word "cars" was used in reference to tramcars, and as meaning tramcars, and that whenever the word is used in reference to omnibuses it is coupled with the word "road," as in the case of the well-known omnibus concern called the London Road Car Company, "road car" being apparently used as distinct from "tramcar." If the county council have power to buy and work omnibuses at all, it must be under this s. 2 alone, and I do not find in the section any words that can reasonably be held to confer the power to buy and work omnibuses.

I am by no means prepared to say that what the London County Council are doing is not very reasonable, very proper, and very beneficial to the public, if only it is within their power under the statutes; but what they are doing is this. They have extended what I may call the "subsidiary lines" beyond the point to which the tramway company, who were their predecessors, ever carried them; for, whereas one line went over Westminster Bridge to Charing Cross and back, and another went over Waterloo Bridge and back, the London County Council have joined the two together and now run what may be a much better and more convenient and more beneficial line altogether—a line, that is to say, beginning at Waterloo Station, going over Waterloo Bridge, along a portion of the Strand to Charing Cross, then over Westminster Bridge, and then back again. What the county council are doing, therefore, is not what the London Tramways Company did, but something different, an improvement possibly, but not the same thing. Now, one difficulty that the London County Council have to deal with is that by s. 68 of the Local Government Act, 1888, all receipts of the county council are to be carried to a fund entitled the "County Fund," and all payments are to be made out of that same fund, so that, unless they are authorized as trustees and administrators of that fund to spend any part of it on the running of omnibuses, they have no title to do what they are doing. Their counsel sought to get over the difficulty by a reference to s. 21 of the London

County Council (Vauxhall Bridge Tramways) Act, 1896, a section which is admitted to be quite general. The section relates to receipts and expenditure in connection with the council's tramways generally: the council are to "cause accounts to be kept of their receipts and expenditure in connexion with tramways." But the entire section is governed by the words "in connexion with tramways," and unless it can be shewn that this running of a line of omnibuses is, within the meaning of the statute, part of the tramways scheme, then this section does not help the appellants in any way.

Having now dealt with what I think are really the important questions in this case, I will say a word or two upon s. 31 of the London Tramways Company (Limited) Act, 1896, on which counsel for the appellants have placed some reliance. That section provides that the London Tramways Company on the one hand, and the London County Council on the other, may from time to time carry out arrangements with reference to the purchase by the London County Council of any tramways for the time being belonging to the company, "including any works and property connected therewith." Now, the word "works" must have reference to the tram lines, it being necessary to lay down special lines in the roadway over which the tramcars have to travel; but the omnibuses pass along and over the street like any ordinary vehicle, so that there are no "works" about the omnibus lines at all. In my opinion, the word "works" in that section does not include any works in connection with the omnibus lines, and that even if the word "property" can be said to include omnibuses, it can only include the omnibuses themselves, and does not include any power of running the omnibuses.

But it is said that, although the London County Council may not be expressly authorized to run the omnibuses, yet the undertaking is one so intimately connected with the powers that are expressly given to them of working the tramways that, under the doctrine mainly depending on the judgment of James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (1), it may be treated as being really within their statutory powers.

(1) 11 Ch. D. 449.

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Now, it is not to be denied, and I do not think any one ever has denied, that there are certain things which a statutory corporation may do, although not absolutely mentioned in their Act, but they must be things of a very different degree of importance from that which the county council contend they have the right to do in the present case, namely, the running of omnibuses. This is a separate undertaking from that of the tramways; and I cannot read in the observations of James L.J. anything to authorize the notion that a separate undertaking may be entered upon, merely because it is thought to be convenient for the purposes of the main undertaking. I find no authority for that at all. Indeed, in the case of *Colman* v. *Eastern Counties Ry. Co.* (1), it might well have been argued, as it was argued, that to run a steamboat from Harwich to the Continent was most advantageous for the Eastern Counties Railway Company, and therefore ought to be taken as having been impliedly granted to them for the purposes of the undertaking which they were expressly authorized by their Act to carry on; but Lord Langdale would not assent to that argument at all. He said that what the railway company claimed the right to do was outside the power given to them by their Act of Parliament, and that, however advantageous it might be, there was no statutory authority to do it. So here, these lines of omnibuses run by the London County Council may be—and I am willing to assume that they are—very advantageous for the council and for the public; but if they have no power and no authority under their statutes to run the omnibuses, all that avails nothing. They must shew statutory authority to run the omnibuses before they can be allowed to do so.

Then it was said that the Attorney-General is here suing at the relation of rival traders or companies, and that there is not sufficient public benefit shewn to arise from the action which is brought in his name to justify it. For my part I must say that, if there be a case in which a public body is going beyond its powers, I do not see any reason why the Attorney-General should not interfere. Of course, before he allows his name to

(1) 10 Beav. 1.

be used, he has to consider, in the exercise of his discretion, whether it is worth while to interfere; but any attempt to tie him down by rules which I do not know to exist anywhere, or to tie him down for the first time by rules, should not, I think, be allowed. But in this case it is not really necessary to go into that question, for the relators are also plaintiffs. Not only are they plaintiffs, but they are also ratepayers in the county of London; and I think, therefore, there can be no doubt whatever that, as a combination of what used to be called information and bill, the action is properly constituted, and the case made against the London County Council properly raised. I do not at all accede to a suggestion made by Mr. Macnaghten that these relators must necessarily be plaintiffs, and that you cannot, as a rule, have an information without the relators being plaintiffs, for that is not the rule and never was. However, as a matter of fact, these relators are also plaintiffs, and we are therefore absolved from any minute inquiry as to the degree of public benefit that may justify the Attorney-General in bringing the action.

I think that, upon all the grounds I have stated, the case for the London County Council fails, and that it must be held that they have no power to run these omnibuses. The result, therefore, is that the appeal fails and must be dismissed with costs.

VAUGHAN WILLIAMS L.J. I entirely agree with all that has been said by the Lord Justice, but I feel that I ought to say a word or two, because the case is one of some importance. There is one short passage in the judgment of Cozens-Hardy J. which seems to me to express the whole case. "It seems to me," says the learned judge, "that the London County Council are really carrying on a separate and distinct business of omnibus proprietors; they do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the Act of 1843 for regulating hackney and stage carriages in and near London, they are bound to take any passenger who desires a ride and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in

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the streets of London is certainly not expressly authorized by the Act of 1896, and, in my opinion, it is not impliedly authorized." I will now deal myself with the points which have been made on behalf of the London County Council on this appeal. First of all it is said that the London County Council, by reason of the statutory powers granted to them of acquiring the tramways and the property of the tramway company, and of running the tramcars, had, in the events which happened, the power by express words, or reasonable implication therefrom, of running these omnibuses. Secondly, it is said that the London County Council is, by virtue of the Local Government Act, 1888, in the position of a municipal corporation created by charter, and has the same power of action and of contracting that a private individual would have, even although the running of these omnibuses should be outside the statutory power of the London County Council, expressed or implied, unless, indeed, the London County Council, for the purpose of maintaining and running their omnibuses, had to come upon the rates, or some other fund which is appropriated to statutory purposes.

Now, as to the first point, I think that the express statutory powers do not extend to the running of these omnibuses. The express powers relied on are those contained in s. 2 of the London County Tramways Act, 1896, which was an Act to enable the London County Council to work the tramways they had purchased from the London Tramways Company, Limited, which purchase included the undertaking and property referred to in s. 31 of the London Tramways Company (Limited) Act, 1896. My Lord has already pointed out that the express words which are contained in those two sections do not cover the running of these omnibuses; and I agree with the view of Cozens-Hardy J. that these omnibus lines are not run, and could not be run, even if it were necessary so to do, solely as ancillary to the tramway business. Coming, as they do, from the south side of the Thames at the terminus of the tramway lines there near Westminster Bridge, and from the terminus of the tramway lines on the south side of the Thames near Waterloo Bridge, by a route over the two bridges, and along

the northern side of the Thames, they are bound by statute to carry passengers who wish to be carried in that direction, and along that not inconsiderable distance, although such passengers may have no intention to go to or come from the tramways at all.

Then it is said that the power to run these omnibuses, although not within the express words that I have been dealing with, is yet impliedly given by the terms of one or other, or both, of the Acts of 1896 I have mentioned. Now, I do not propose to go at any length into this question, which was dealt with in *Attorney-General* v. *Great Eastern Ry. Co.* (1) Lord Blackburn in his speech on p. 481, and Lord Watson in his speech on p. 486, both, it will be observed, first point out that, where there is a corporation exercising statutory powers of this sort, it is not limited to the exercise of the express powers, but may treat those powers as extending to matters which are incident to, or by implication included in, the express powers; and then go on to point out that whatever cannot be brought within the express or implied powers the Legislature must be held to have prohibited. The observations made by both their Lordships seem to me to have a considerable bearing upon this particular case. I ought to add, however, that when one is dealing with this question whether the power of running these omnibuses is fairly to be implied from the express power to run the tramways because, as it is said, it is found very convenient for the tramway business to have such omnibuses, not only has one to take into consideration that these omnibuses, having regard to the distance and the route they traverse, must necessarily take passengers who have nothing to do with the tramway lines or the trams at all, but also that the powers of tramway companies are very strictly defined by the general Tramways Act, 1870, an Act which deals, amongst other things, with the power to make by-laws, with the fixing of fares and tolls, and with various offences which may be committed upon the tram lines; and it seems to me that it would be a very strong thing to say that you must include, amongst the powers implied from the grant to the

(1) 5 App. Cas. 473.

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London County Council of the power to run these tramways, powers which are not in any respect regulated by the elaborate provisions of the Act of 1870, but, on the contrary, are regulated by a statute which is in many respects entirely different in its provisions, that is to say, the Metropolitan Stage Carriage Act, 1843. That is all I propose to say as to the first point.

Now, as to the second point, namely, that the London County Council are to be treated really as if they were a common law corporation created by charter and having all those powers which are defined in *Sutton's Hospital Case* (1) which was cited by Mr. Haldane, and that, therefore, the London County Council should not be restrained by injunction, even though the running of these omnibuses is outside their statutory powers. That argument is based upon s. 2 of the Local Government Act, 1888. That Act says that the council of a county "shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject *nevertheless to the provisions of this Act*, and in particular to the following provisions"; and then follow provisions relating to qualification, periods of election, and other matters of details of that sort. Now I read that section as if it had said, the council of a county created by this statute shall be constituted, elected and so on, and as to these matters be in a like position in all respects as the council of a borough, "subject nevertheless to the provisions of this Act." It seems to me that it is impossible to say of this corporation, the London County Council, which has been created under this statute, that the words in s. 2 entitle it to be treated as if it had not been created by a statute at all, but had been created by a common law charter, just as a municipal corporation under the Act of 1882 is a common law corporation so created. It seems to me that so to read s. 2 would be giving no effect to the words "subject nevertheless to the provisions of this Act"; and, further than that, it seems to me that this is a mere machinery section. On looking at the Municipal

(1) 10 Rep. 1 a, 30 b.

Corporations Act, 1882, ss. 10 to 16, one finds that the matters there provided for are matters of machinery and detail of the same character as those which are provided for in s. 2 of the Local Government Act; and I therefore read s. 2 as a mere machinery section, dealing with the constitution, election, and conduct of proceedings, and not as a section making a radical alteration in the origin and incorporation of the county council, changing it, in effect, from a corporation incorporated by a statute for the particular purposes mentioned in the statute to a corporation created by charter and outside the statute altogether. If it had been intended to make any such provision one would have expected to find it, not in this machinery section at all, but in the 79th section of this Act of 1888.

Then it has been argued that the London County Council cannot be restrained by injunction because they can maintain and run their omnibuses without coming upon the rates. It seems to me that there is really nothing in that point, because it admittedly depends on s. 21 of the council's Vauxhall Bridge Act. It is plain that that section has no application at all unless the London County Council are able to satisfy the Court that, in running these omnibuses, they are doing something incidental to their statutory powers to work the tramways.

Lastly, it has been argued that the Court ought not to grant an injunction because this is a case in which, it is said, the Attorney-General should not have allowed his name to be used at all, the action being really an action brought, so it is said, by certain omnibus proprietors for the purpose of preventing, if they can, the competition of the London County Council. Whatever weight might be given to that argument under different circumstances, in this particular case, at all events, the relators are ratepayers, and as such have a right to ask the Attorney-General to allow his name to be used in order to test the question whether the running of these omnibuses can be justified under the county council's statutory powers.

STIRLING L.J. I am of the same opinion. There are two main points which have been argued before us in this case:

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the first is as to the construction of s. 2 of the London County Tramways Act, 1896, which seems to have been the point mainly argued before the learned judge in the Court below. As regards that, I do not propose to say anything, because I entirely agree with the conclusions of fact and of law at which the learned judge arrived, and for the same reasons. But out of respect to the arguments which have been addressed to us, I should like to say a few words with reference to the second point, which seems to have been raised for the first time on this appeal, that is, that the London County Council possesses all the powers of a common law corporation. Now, unquestionably, the London County Council is a creation of statute, for it was created by the Local Government Act, 1888. But that does not dispose of the question, because it may be that the statute has conferred upon the London County Council all the powers of a common law corporation. The incorporation is effected by s. 79 of the Act, which says: "The council of each county shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have perpetual succession and a common seal," and so forth. Now, that section at any rate does not confer on this statutory corporation the powers of a common law corporation. Again, the Act contains a group of clauses beginning with s. 3, headed "Powers of County Councils," and we do not find it expressly enacted in those clauses, or anywhere else, that the powers of the county councils are to be those of common law corporations. What is relied upon are the words in s. 2, sub-s. 1, of the Act, the first two sections being grouped together under the head of "Constitution of County Council." What is said there is this: "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act." The ground on which it is suggested that we should hold that the powers of the London County Council are those of a common law corporation is this: we are referred to the Municipal Corporations Act, 1882, as defining the

position of a council of a borough, and s. 10, sub-s. 1, is relied upon, which says: "The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this Act or otherwise." Now the first observation that occurs to me upon s. 2, sub-s. 1, of the Act of 1888 is this—that the council of the county is not to be in the like position in all respects as "the council of a borough," but only as the council of a particular kind of borough, namely, "of a borough divided into wards." I apprehend that that qualification points to something which is peculiar to the position of the council of a borough divided into wards, and which distinguishes it from a council of a borough which is not divided into wards; and on looking at the sections which follow s. 10 of that Act, we find that there are peculiarities which distinguish a council of a borough divided into wards from a council which is not. But in the second place, the council of a borough is not a municipal corporation; the municipal corporation itself is, generally speaking at any rate, a common law corporation created by charter, and the way in which the Legislature has thought fit to confer powers upon the council of a borough is by enacting, by s. 10, sub-s. 1, of the Act of 1882, that "the council shall exercise all powers vested in the corporation by this Act or otherwise." So that the council of a borough is to exercise all the powers of the municipal corporation of the borough, that is, of a common law corporation.

Now, if we were to hold that the words "in the like position in all respects" were intended to refer to powers, it seems to me that we should arrive at an extraordinary conclusion, because there is no separate corporation mentioned in the Act of 1888 whose powers the council are to exercise. The council, under s. 79 of that Act, is itself the corporation; and to see what its powers are we have to look at s. 3 and the following sections of the same Act, which expressly state what powers are vested in county councils. I come to the same conclusion, therefore, as my learned brothers, that s. 2 in the Act of 1888 does not relate to the powers of county councils at all, but simply deals with matters which relate to their constitution, or

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in other words, as Vaughan Williams L.J. described it, it is a machinery section. That being so, the London County Council is left simply in the position of a statutory corporation, and anything which lies beyond the powers conferred upon it by statute must be taken, according to the decisions, to be prohibited.

That brings me to the remaining point which has been argued before us, namely, that in this case there is not sufficient ground for the Attorney-General interfering and bringing this action to prevent the abuse of the statutory powers. That argument is based upon the opinion expressed by James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (1), which was dissented from by Baggallay L.J. It does not seem to me necessary on this occasion to decide anything upon the point on which those two learned judges differed: it is sufficient to read the following statement of the rule by James L.J., which was not dissented from (2): "Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour, and ought to be at once stopped." Now it seems to me that, upon the facts which have been found by the learned judge in the Court below, the London County Council is violating an express enactment, because, by s. 68 of the Local Government Act, 1888, it is provided that "all receipts of the county council, whether for general or special county purposes, shall be carried to the county fund, and all payments for general or special county purposes shall be made in the first instance out of that fund." That is a section which was introduced for important purposes. The London County Council (Vauxhall Bridge Tramways) Act, 1896, s. 21, creates an exception from that general enactment, but it only authorizes the exception in the case of receipts and expenditure in connection with tramways; and the moment you arrive at the conclusion at which Cozens-Hardy J. has arrived, and with which we agree—that the London County Council are really carrying on an independent business of omnibus proprietors—the exception created

(1) 11 Ch. D. 449. (2) 11 Ch. D. 483.

by that section no longer applies. Therefore, in respect of the receipts of this independent business, the London County Council must obey the direction which is contained in s. 68 of the Act of 1888: but that is not done. Accordingly, it seems to me that the case is brought within the very rule laid down by James L.J., and that the decision of the Court below was right. The appeal must, therefore, be dismissed.

Hon. E. C. Macnaghten, K.C., applied for an injunction.

Haldane, K.C., asked that, if an injunction was granted, it might be suspended for a reasonable time, in order that the defendants might consider whether they should appeal to the House of Lords.

THE COURT made a declaration as asked by the statement of claim and granted an injunction, but directed that the operation of the injunction should be suspended for one month, and, if the defendants appealed to the House of Lords, then until that appeal had been decided.

Solicitors: *Hicks, Davis & Hunt; W. A. Blaxland.*

G. I. F. C.

C. A.
1901
BUCKLEY J.
March 1.
C. A.
March 20.

COLLISON *v.* WARREN.

[1901 C. 570.]

Practice—Motion by Defendant before Pleading—Mandatory Interlocutory Injunction against Plaintiff—Order to Deliver up Possession of a House.

Per Buckley J.: A defendant may before delivering a counter-claim apply by motion for an injunction against the plaintiff if he and the plaintiff are both suing upon the same contract.

An interlocutory injunction was, on the defendant's motion, granted to restrain the plaintiff from interfering with or disturbing the defendant in his possession and occupation of a house.

Spurgin v. *White*, (1860) 2 Giff. 473, followed.

Decision affirmed by the Court of Appeal.

On August 31, 1899, William Ebenezer Collison, the plaintiff, the proprietor of the Norfolk Mansions Hotel, Wigmore Street, executed a deed of arrangement for the benefit of his creditors whereby, after reciting that a committee of inspection had been appointed, he, as beneficial owner, assigned to the defendant Charles Warren, as trustee for the creditors, all his property in the said business, except the leasehold house in which the business was carried on, upon trust, "so long as he shall think fit, to carry on the said business of a hotel proprietor, as hitherto carried on by the said debtor, in such way or manner as to him and the said committee shall seem best, and to call in, collect, and receive the said personal estate, with power nevertheless for the said trustee, with the consent of the said James Stephens" (the holder of a bill of sale on the property) "and the said committee, to sell all and any part of the trust estate, either as a whole or in parcels, and either by public auction, tender, or private contract, and with power to sell or transfer the whole or any part or parts thereof to the debtor, or to any member of the committee, and also to redeem any property in mortgage, or subject to any charge, incumbrance or lien, and also to convey any equity of redemption, and in the meantime to engage the services of the said debtor, who and whose wife and family shall during such engagement be entitled to reside and board on the said premises, as

manager of the said business, at a salary of 100*l.* per annum payable monthly." The debtor also covenanted to execute (if called upon) all deeds necessary for vesting the leaseholds in the trustee or a purchaser, and in the meantime to hold them as a trustee for such purposes as the creditors' trustee and the committee should direct.

Collison accordingly continued to reside in the hotel as manager in the service of the trustee.

On February 11, 1901, the defendant sent to Collison the following letter: "I regret to inform you that, owing to your continued habits of intemperance, the committee of inspection has instructed me to summarily dismiss you from the management or control of the hotel, and you are to accept this intimation as final notice of your dismissal, and that from this day your services are no longer required, and you are requested forthwith to leave the premises. I inclose a cheque for 16*l.* 13*s.* 4*d.*, being one month's wages in lieu of notice and allowance for board and residence for yourself and family."

On receipt of this letter Collison refused to go, and commenced proceedings against the trustee, and on February 16 he issued the writ in this action, claiming—(1.) A declaration that the plaintiff was entitled to be engaged as manager, pursuant to the deed of August 31, 1899, at a salary of 100*l.* per annum, and that the plaintiff, his wife and family, were entitled to reside and board in the hotel. (2.) That the trusts of the deed might be carried out so far as might be necessary having regard to the declaration. (3.) An injunction. (4.) Damages for breach of trust.

On February 23 the defendant gave notice of motion in the action, for an order (*a*) that the plaintiff, his servants or agents, his wife or any member of his family, might, until the trial of the action, be restrained from remaining in or upon the hotel; (*b*) for an injunction to restrain the plaintiff, until the trial of the action, from in any way interfering with the conduct or management of the business of the hotel.

In his evidence the defendant alleged that he intended to ask by counter-claim for relief similar to that claimed by the notice of motion.

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The motion was heard before Buckley J. on March 1, 1901.

Astbury, K.C., and *Harold Simmons*, for the motion.

Israel Davis, for the plaintiff. This application is misconceived. The defendant has no right to give this notice of motion in this action. The relief sought by him is not incident to or arising out of the relief sought by the plaintiff: *Carter* v. *Fey*. (1) Secondly, there is no precedent for an injunction such as the defendant now asks. His proper course is by ejectment at law. Evidence of drunkenness is not enough; it must be shewn that it is injuring the business.

Astbury, K.C., in reply. The plaintiff and the defendant are both suing on the same agreement, so the defendant is entitled to move in the action: *Sargant* v. *Read* (2), which was distinguished in *Carter* v. *Fey*. (1) The defendant is compelled to ask for this injunction, for the police will not interfere in such a case. A similar order was made in *Spurgin* v. *White*. (3)

BUCKLEY J. stated the facts, held that the charge of intoxication was proved and in fact admitted, and continued:—The first question is whether the defendant is right in moving in the action. In my opinion he is. In 1876 Jessel M.R. determined, in *Sargant* v. *Read* (2), that a defendant in a partnership action might, before judgment, apply for an injunction and a receiver, notwithstanding that the plaintiff had already served notice of motion for the like purpose; and the basis of that decision was that where an action is brought by the plaintiff relying on a cause of action, and the defendant wants relief arising from the same cause of action—not necessarily the same relief—he may by motion in the same action, before counter-claim delivered, obtain that relief. In *Carter* v. *Fey* (1), a case in which the defendant ineffectually tried to move in the action, the principle I have stated was held by the Court of Appeal to be the true one. Lindley L.J. said (4): "The defendant's claim is not for any relief arising out of or incidental to the relief sought to be obtained by the plaintiff in

(1) [1894] 2 Ch. 541.
(2) (1876) 1 Ch. D. 600.
(3) 2 Giff. 473.
(4) [1894] 2 Ch. 544.

his action. In this respect the case differs from *Sargant* v. *Read* (1), which was an action for dissolution of a partnership and for taking the partnership accounts, and Sir G. Jessel there held that the defendant was entitled to give a cross notice of motion in the plaintiff's action for the appointment of a receiver. It differs also from *Porter* v. *Lopes* (2), which was a partition action, and there the defendant was held entitled to move for a receiver for the protection of the property." I understand the Lord Justice in that passage to mean that, if the defendant's claim is for anything incidental to the plaintiff's claim, he is entitled to move in the action. Lopes L.J. said (3): "The question is this—whether the defendant can move for an injunction against the plaintiff without filing a counter-claim or issuing a writ in a cross action. In my opinion he can in some cases, but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action, or is incidental to it." And Davey L.J. said (4): "In my opinion, it must be relating to or arising out of the relief sought in the action which is before the Court, and that any other injunction cannot properly be granted in the action."

I ask myself, What in this case is the cause of action on which the plaintiff is suing? It is the contract contained in this deed of arrangement. He affirms that, as the result of that contract, he is entitled to be employed as manager of the hotel. What is the defendant's cause of action? It is identically the same thing from the opposite point of view. He negatives the plaintiff's claim to be employed, and claims to prevent him from interfering with the management. In that state of things I think he is entitled to move in the plaintiff's action.

It is a novelty to me that an order can be obtained to restrain a person from remaining in a house, which is, of course, equivalent to a mandatory order upon him to go out. But I have been referred to *Spurgin* v. *White* (5), where the Vice-Chancellor granted an injunction to restrain the defendant

(1) 1 Ch. D. 600.
(2) (1877) 7 Ch. D. 358.
(3) [1894] 2 Ch. 545.
(4) Ibid. 546.
(5) 2 Giff. 473.

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till further order from "disturbing, hindering, or molesting the plaintiffs, or their agents, in the possession or enjoyment of the said house, books, stock-in-trade, pictures, furniture and effects, or in carrying on the business and objects of the said society at the said house"—that is, from interfering with the occupation of the house; and the order contained words giving the defendant the right to use two rooms for two months with a right of access to other rooms for the purpose of removing his stock and property. As I read that, an injunction was granted to restrain the defendant from interfering with the possession of persons who said that he was there wrongfully. That appears to me to be a precedent for an order which I am prepared to make, which will have the effect of restraining the plaintiff from remaining in possession of the premises. [His Lordship said that the plaintiff had already had sufficient time, and refused to extend it so as to enable him to file further affidavits, and continued:—]

On the other hand, there is evidence that the plaintiff has been suffering from illness, which induces me to shew some indulgence. I grant an injunction to restrain him from interfering with or disturbing the defendant in his possession and occupation of the hotel; and, secondly, from in any way interfering with the conduct or management of the business; but I shall direct that the first part of the order be not enforced for a fortnight.

H. C. R.

C. A. The plaintiff gave notice of appeal.

March 13. The Court of Appeal further suspended the operation of the first part of the injunction over March 20, and directed that the appeal should be heard on that day.

March 20. *Israel Davis*, for the plaintiff. On the true construction of the deed the trustee has no power to dismiss the plaintiff. At any rate, the manager of an hotel is not a menial servant, and he is entitled to a longer notice than a month: *Todd* v. *Kerrich* (1); *Lawler* v. *Linden*. (2) It is

(1) (1852) 8 Ex. 151. (2) (1876) Ir. R. 10 C. L. 188.

contrary to the practice for a defendant who has not pleaded or delivered a counter-claim to move for relief against the plaintiff when the relief for which he asks does not arise out of the relief which the plaintiff claims: *Carter* v. *Fey*. (1) And it is without precedent that a man who has for so long had the legal possession of his rooms in the hotel should be turned out of possession upon an interlocutory motion. *Spurgin* v. *White* (2), which Buckley J. followed, is distinguishable from the present case, for there possession had been taken by violence.

Astbury, *K.C.*, and *Harold Simmons*, for the defendant, were not called upon.

RIGBY L.J. The order appealed from amounts in effect to this—that the plaintiff is restrained until judgment in the action from interfering with the possession of the hotel by the trustee. The question really is, How does the plaintiff happen to be in the hotel? In what capacity and on what grounds does he claim to be there? He says he is the manager—the irremovable manager—of the business of the hotel. He founds this claim upon the construction of the power given by the deed to the trustee to engage his services as manager of the business, the power being coupled with the provision that he and his wife and family shall during his engagement be entitled to reside and board on the premises, and the plaintiff claims to be entitled to remain in possession of the rooms in the basement of the hotel in which he and his wife and family have been living. It is plain that he is not claiming to be there either as owner of the hotel or as trustee for the person who has a charge upon it. That being so, I think there is no foundation for the plaintiff's claim to retain possession of the rooms. He has been summarily dismissed from his position of manager by the trustee, with the approval of the committee of inspection. We have not now to consider the precise grounds alleged for the plaintiff's dismissal, but he has been summarily dismissed. The trustee has paid him a sum of money as

(1) [1894] 2 Ch. 541. (2) 2 Giff. 473.

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covering all possible damages to which he may be entitled. We have not now to consider whether that is the right amount or not. Upon the plaintiff's dismissal his right during his engagement as manager to occupy rooms in the hotel was, in my opinion, terminated, and although the operation of the injunction has been suspended first by the learned judge for a fortnight, and afterwards by the order of this Court over to-day, I cannot see that this affects the question whether the order ought or ought not to have been made. Under the terms of the creditors' deed the trustee is entitled to manage the business as he thinks fit, not as the plaintiff thinks fit. In my opinion Buckley J. was quite right in granting the injunction, and the appeal ought to be dismissed.

VAUGHAN WILLIAMS L.J. and STIRLING L.J. concurred.

Solicitors: *Lewis Davis; W. Gipps Kent.*

W. L. C.

SHUTTLEWORTH *v.* MURRAY.

C. A.
1901
Feb. 28;
March 1, 22.

[1875 S. 174.]

Will—Construction—Limitations of Real Estates—Shifting Clause—Successive Life Estates—Exception of Eldest Son entitled to other Estates.

A shifting clause, or an exception in the nature of a shifting clause, in limitations of real estate must be strictly construed, and not according to the rule of construction which has been adopted in the case of provisions for children made by a parent or a person in loco parentis.

A testator in 1855 devised his real estates to the use of all and every the sons of his nephew Richard successively, for their respective lives, "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits" of the C. estates "after the decease of Richard as tenant for life or any greater estate or interest whatsoever."

In January, 1869, Richard and his eldest son, being then respectively tenant for life in possession and tenant in tail in remainder of the C. estates, disentailed those estates, and appointed them to trustees on trust for sale, and to hold the proceeds of sale on trusts under which the son took a beneficial interest, and the estates were accordingly sold by the trustees.

In 1875 the testator died. In 1899 the nephew Richard died:—

Held, that the eldest son of Richard was not by virtue of the exception contained in the will excluded from a life interest in the devised estates.

Decision of Cozens-Hardy J., [1900] 1 Ch. 795, reversed.

Collingwood v. *Stanhope*, (1869) L. R. 4 H. L. 43, explained.

APPEAL against the decision of Cozens-Hardy J. (1)

Edmund Grimshaw, by his will dated January 29, 1855, devised his real estates in Lancashire to uses which had ceased or failed to take effect, and subject thereto to the use of his nephew Richard Atkinson and his assigns during his life, and from and immediately after his decease to the use of the testator's nephew Francis Frederick Brandt and his assigns during his life, and from and immediately after the decease of F. F. Brandt to the use of all and every his son and sons who should be born in the testator's lifetime or in due time after and all and every the son and sons of Richard Atkinson then living, and who should be born in the testator's lifetime

(1) [1900] 1 Ch. 795.

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or in due time after "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits of certain estates situate within the parish of Cockerham after the decease of the said Richard Atkinson as tenant for life, or any greater estate or interest whatsoever," severally and successively in remainder one after another, and as between each branch as they and every of them should be in seniority of age and priority of birth, but as between the two branches alternately and turn by turn, and their assigns during their several and respective lives, the eldest or only one of such sons or son of the said F. F. Brandt taking the first turn, and the eldest or only one of such sons or son of the said Richard Atkinson (other than and except as aforesaid) taking the next turn, and so successively changing from one branch to another; with limitations over, under which, in the events which happened, the remainder in fee became vested in Richard Atkinson.

The testator died on January 10, 1875. F. F. Brandt died in his lifetime without having been married. Richard Atkinson had several children, the eldest of whom, Richard Norton Atkinson, was born on February 17, 1847.

In January, 1869, Richard Atkinson was tenant for life, and Richard N. Atkinson was tenant in tail male in remainder of the Cockerham estates. By a deed dated January 16, 1869, R. Atkinson and R. N. Atkinson disentailed the Cockerham estates, and limited them to such uses as they should jointly appoint. By a deed dated January 19, 1869, the same estates were jointly appointed by the father and the son to trustees, upon trust for sale. By another deed dated January 19, 1869, it was declared that the trustees should stand possessed of the proceeds of sale (after payment of specified incumbrances) upon trust to pay 7000*l.* to R. Atkinson, and to invest the remainder and stand possessed thereof upon trusts under which R. N. Atkinson took benefits. The estates were subsequently sold by the trustees, who received the proceeds of sale.

In 1870 R. N. Atkinson became bankrupt, and his interest in the proceeds of sale of the Cockerham estates, and also his interest under the testator's will, were acquired by his father

Richard Atkinson from the trustee in the bankruptcy. Richard Atkinson died on August 22, 1899. A summons was taken out to determine the question whether, by reason of the exception contained in the will of "an eldest son for the time being entitled to the possession or to the receipt of the rents, &c., of the Cockerham estates," R. N. Atkinson was excluded from the life estate given to him by the will. Cozens-Hardy J. held that he was excluded.

The representatives of Richard Atkinson appealed.

Haldane, K.C., *Hon. E. C. Macnaghten*, K.C., and *Hon. T. H. Watson*, for the appellants. The decision of the learned judge is founded on a fallacy. He has confused the authorities upon shifting clauses with those which relate to portions. The exception in this will is equivalent to a shifting clause. A shifting clause must be construed naturally and strictly: *Meyrick* v. *Laws*. (1) There is no presumption, as there is in the case of portions for children, that equality is intended: *Scarisbrick* v. *Lord Skelmersdale* (2), in which case the distinction was clearly pointed out by Maule J. (3) In the case of a father or a person in loco parentis, there is a presumption that he intended equality between his children or those to whom he stands in the relation of a parent: *Collingwood* v. *Stanhope* (4); *Reid* v. *Hoare* (5); *Lord Teynham* v. *Webb* (6); *Harrison* v. *Round* (7); *Sandeman* v. *Mackenzie*. (8) Cozens-Hardy J. based his decision upon *Collingwood* v. *Stanhope* (4); but it is submitted that, as that case related to portions, it has no application to a shifting clause. Moreover, there are in the present case the words "rents and profits," which point to actual possession, as in *Harrison* v. *Round* (7); those words did not occur in *Collingwood* v. *Stanhope*. (4) On the strict construction of the exception in the will, the event upon which the eldest son was to be excluded has never happened.

(1) (1874) L. R. 9 Ch. 237.
(2) (1840) 4 Y. & C. Ex. 78.
(3) 4 Y. & C. Ex. 113 et seq.
(4) L. R. 4 H. L. 43.
(5) (1884) 26 Ch. D. 363.
(6) (1750) 2 Ves. Sen. 198.
(7) (1852) 2 D. M. & G. 190.
(8) (1861) 1 J. & H. 613.

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Swinfen Eady, K.C., Vernon Smith, K.C., and *E. S. Ford*, for mortgagees of the second son of Richard Atkinson. The question is not of the divesting of a previous vested interest, but whether a person comes within a particular class. It is submitted that the gift here is to a class, and the particular period of time for ascertaining the class is the death of Richard Atkinson. The words, "an eldest or only son for the time being entitled," mean "an eldest or only son who is for the time being entitled, or who has become entitled," as was said by Lord Westbury in *Collingwood* v. *Stanhope*. (1) And the principle in that case should be applied to the present case.

Harrison v. *Round* (2) is really in favour of the respondents. That was the case of a shifting use, and it applies though the clause occurred in a settlement, not in a will. By the joint act of the father and son the son has become the "eldest or only son entitled" under the terms of the will. *Macoubrey* v. *Jones* (3), which was cited by Lord Cairns in *Collingwood* v. *Stanhope* (4), has little to do with the present case.

[RIGBY L.J. It is important as having been cited by Lord Cairns (5) to shew what was the rule of law applicable to such a case as *Collingwood* v. *Stanhope*. (4)]

Macoubrey v. *Jones* (6) deals with *Harrison* v. *Round*. (2)

Scarisbrick v. *Lord Skelmersdale* (7) is a very special case. The rule as to portions being applicable only to persons standing in loco parentis is stated in Lewin on Trusts, 10th ed. p. 450. *Domvile* v. *Winnington* (8), referred to by the learned judge below, was, no doubt, a case of portions. As James L.J. said in *Boyes* v. *Cook* (9), to assist us in arriving at the testator's intention, we are entitled to place ourselves in his armchair and consider the circumstances by which he was surrounded when he made his will. Here the testator knew that his nephew had an interest in the Cockerham property, and that this nephew's eldest son had at all events some interest in the

(1) L. R. 4 H. L. 58, 59.
(2) 2 D. M. & G. 190.
(3) (1856) 2 K. & J. 684.
(4) L. R. 4 H. L. 43.
(5) L. R. 4 H. L. 61.
(6) 2 K. & J. 684, 698–9.
(7) 4 Y. & C. Ex. 78.
(8) (1884) 26 Ch. D. 382.
(9) (1880) 14 Ch. D. 53, 56.

property, though he did not know under what particular limitations.

Haldane, K.C., in reply.

Cur. adv. vult.

March 22. RIGBY L.J. This case turns, I think, entirely upon the construction of a clause in the will of Edmund Grimshaw, who was, I understand, in his lifetime a conveyancer. [His Lordship read the clause above stated, and continued:—]

The question is, whether Richard Norton Atkinson, who was the first-born son of Richard Atkinson, the tenant for life under these limitations, and who therefore clearly came within the description "an eldest or only son for the time being," also came within the words "entitled to the possession or to the receipt of the rents, issues, and profits" of the Cockerham estates.

In the year 1869 those estates stood limited to the use of R. Atkinson for life, with remainder to his son R. N. Atkinson in tail. R. N. Atkinson was born in 1847, and soon after his attaining twenty-one he concurred with his father in a disentailing deed, by which the estates were limited to such uses as the father and son should jointly appoint. Soon afterwards they appointed the estates to trustees upon trust for sale, and by another deed it was declared that the trustees should hold the proceeds of sale upon trusts under which R. N. Atkinson took some benefits. The trustees sold the estates and received the purchase-money, and from that time forth the Cockerham estates were possessed and held and enjoyed by entire strangers—at any rate, not by R. Atkinson or R. N. Atkinson. The estates went away completely, and thenceforth in no reasonable meaning of the words could it said that any son of R. Atkinson was in possession or in receipt of the rents of the Cockerham estates. It was of course possible that the son might have repurchased those estates, or his father might have repurchased them and might have settled them upon his son; but nothing of the kind took place, and in fact neither of those persons from that time forth had any interest whatsoever in the Cockerham estates. Moreover, R. N. Atkinson became

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bankrupt in the year 1870, and, if he had then possessed the estates in remainder in tail, they would have gone over to the trustee in the bankruptcy, and his interest would have disappeared. But in fact he had then only an interest in the proceeds of the sale of the estates, and that interest was purchased by his father R. Atkinson from the trustee. At that time, when the Cockerham estates had passed into the hands of strangers, the will of Edmund Grimshaw, which was made in January, 1855, had not come into operation. For about twenty years after it was made it was presumably a secret document; at any rate, it was only ambulatory, and it was not until the year 1875 that it took effect as an operative instrument by reason of the death of the testator.

I now come back to the construction of the clause in question. I will first observe that the words "entitled to the possession or to the receipt of the rents, issues, and profits" must of necessity be carried on to the subsequent words, "as tenant for life or any greater estate." There is no break in the meaning, and the sentence must be read as if it had run thus: "entitled after the decease of the said Richard Atkinson to the possession or to the receipt of the rents, issues, and profits, &c." There is then a great distinction between these words of exception, as they have been called, and other similar clauses in other cases which have been cited, and that distinction, I think, ought not to be lost sight of for a moment. The exception is of a person entitled after the death of the father to the possession or to the receipt of the rents, issues, and profits as tenant in tail or for a greater estate, and this is the only thing which can bring a son within the exception.

From the very opening of this appeal I have been unable to follow the reasoning by which the learned judge arrived at his conclusion, and this it is which has made me hesitate. I could not appreciate the decision; and when one does not appreciate the opposite point of view, one always feels a doubt whether one appreciates the case at all. The main argument used by the learned judge in support of his conclusion seems to be contained in this passage of his judgment (1): "the words of

(1) [1900] 1 Ch. 797.

exception are technical words which have received an accepted construction for many years." I cannot agree with that proposition—indeed, I differ from it entirely. In my opinion, the words of exception are not technical words: they are ordinary English words, which would receive a plain interpretation, if there were no rule of law against it. I know of no such rule, and I think the words must receive their ordinary interpretation. So far as I know, the words have never before been construed by a Court of Appeal, or by any other Court. Words in some respects resembling them, but in other respects totally different, have under some circumstances received an interpretation different from that which was recognised by the judges who interpreted them as being their natural and primâ facie meaning, and that has been done under the constraint of an overriding general intention attributed to the settlor or testator for reasons independent of the words themselves. I will not attempt to frame a definition which would include every case, nor do I bind myself to approve of every decision on the principle which the learned judge has held to apply to the present case. The question has generally arisen in this way. In a disposition of property made by a parent or a person in loco parentis, when there is a limitation of an estate to one child and a gift of portions charged on the estate to the other children, generally, though not necessarily, the estate is given to the elder son, if there be one, and the portions to the younger children. In that class of cases it has been assumed to be the paramount intention of the settlor that the child who takes the estate should not take also an interest in the portions fund. That is the general purport of the cases, and if there are some exceptional cases which go further, the exceptions do not, in my judgment, bear upon the present case. In such cases it has been held that the real meaning of the settlor was that the child who took the estate should not take an interest in the portions fund. He may have been spoken of as an elder son, and he may be in fact a younger son, but if he takes the estate he is not to take an interest in the portions fund. Conversely, if there is an elder son, and under the actual limitations a younger son takes the estate, that elder son

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is to be deemed a younger son for the purpose of sharing in the portions fund. In all of these cases a secondary meaning has been given to the words "elder" and "younger." Their primary natural and general meaning being "elder" and "younger" in birth, the secondary meaning given to "elder" son is the son who takes the estate, and to "younger" son a son who does not take the estate. In such cases, no doubt on the ground of a general intention, a wide latitude of interpretation has been adopted which may be justified, but which it is hard to justify, by the rule that the paramount intention is to prevail. So far from agreeing with the statement of Cozens-Hardy J. that the words of exception in the present will are technical words, and have received an accepted construction for many years, I dissent from it in toto.

But reference has been made to authorities, and especially to *Collingwood* v. *Stanhope*. (1) That is a case of the very highest authority, and among those who took part in the decision were Lord Hatherley, Lord Westbury, and Lord Cairns. The matter was most carefully considered throughout, and in any case which comes within the fair meaning of the decision it must of course be followed, and I need hardly say that every member of the Court of Appeal would endeavour to follow its real meaning, whatever they might think about it. But decisions of such importance are often relied upon in circumstances to which they have really no application, and that I think is the case here. *Collingwood* v. *Stanhope* (1), properly considered, does not, as it seems to me, in the slightest degree support the order now under appeal. Lord Hatherley, who as Wood V.-C. had in the first instance decided *Stanhope* v. *Collingwood* (2), thought that it was governed by such cases as *Fazakerly* v. *Ford*. (3) But, after hearing the argument in the House of Lords, he was convinced that in relying upon *Fazakerly* v. *Ford* (3) he had made a mistake, and he admitted that *Fazakerly* v. *Ford* (3) could not be treated as in principle authorizing his original decision. In *Fazakerly* v. *Ford* (3), as explained (and I venture to think accurately) by Lord Hatherley

(1) L. R. 4 H. L. 43. (2) (1867) L. R. 4 Eq. 286.
(3) (1831) 4 Sim. 390; 33 R. R. 129.

in the House of Lords, it was sought to displace a vested use in favour of one person and to substitute another use for it, and Lord Hatherley said that in such a case you must follow the strict meaning of the words; you must give them their primary and natural meaning, and if you find that they do lead to the substitution of one use for another, you must give effect to them; and, on the other hand, unless they naturally lead to that result, they have no operation at all. In the present case there is not, strictly speaking, a substitution of one use for another, but there is that which I conceive is in substance exactly the same. If the limitation had been to all and every the son and sons of Richard Atkinson and so on, with a proviso to the same effect as the actual words of exception, it would have come precisely within the principle of *Fazakerly* v. *Ford* (1), as explained by Lord Hatherley with the assent of the other learned Lords. Is there, then, any real difference between saying, I give to the use of all and every the sons, except one who is described in a certain way, and saying, I give to all and every the sons, with a proviso that the gift shall not include a son who is described in the same way? I think there is no difference at all, and therefore I take it that *Fazakerly* v. *Ford* (1), as recognised by the House of Lords in *Collingwood* v. *Stanhope* (2), is an authority which governs the present case.

This is not the case of a parent or a person in loco parentis who is making a provision that an elder son shall have an estate, and that the younger sons or children shall have portions charged on the estate. There is nothing of the kind, or approaching it. There was indeed an attempt to argue, and I think Cozens-Hardy J. was inclined to the view, that there is here a gift to a class, involving a period of distribution. That argument, as it seems to me, is absolutely unfounded. There is not a gift to a class. There is a succession of gifts to individuals taken out of the class of sons. No distribution is to take place, and therefore there is no period of distribution.

The judgments of Lord Hatherley, Lord Westbury, and Lord Cairns accept the view that *Collingwood* v. *Stanhope* (2) came within that class of cases which had been recognised for

(1) 4 Sim. 390; 33 R. R. 129. (2) L. R. 4 H. L. 43.

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very many years—upwards of a century, at any rate—in which the paramount object of the settlement was that the child who took the estate should not take a portion, and that a child who did not take the estate should have a portion whether he was the eldest son or not. This was fully explained by both Lord Westbury and Lord Cairns.

Cozens-Hardy J. referred also to *Domvile* v. *Winnington* (1), and he did so because of an obiter dictum of Kay J., which he admitted was "perhaps not necessary for his decision." The words relied upon were certainly not necessary to the decision: they had nothing whatever to do with it. They only came to this—that if a state of things had arisen, which the learned judge himself considered had not arisen, he might have come to a different conclusion. He, in fact, rejected an interpretation which is analogous to that which Cozens-Hardy J. has adopted in this case. These being the authorities chiefly relied upon by Cozens-Hardy J., and one of them being, to my mind, absolutely contrary to his conclusion, and the other being only an obiter dictum of a judge who did not act upon it, I think the true view is that the words of exception in the present case must bear their primary and natural meaning, namely, that the son who is to be excepted is a son who is after the death of his father Richard Atkinson entitled to the possession or to the receipt of the rents, issues, and profits of "certain estates" at Cockerham. It is curious that the testator does not identify those estates—he only says "certain estates." I am not sure that he really knew what he was talking about. He had an idea that there were some estates at Cockerham which in some way were or had been connected with the Atkinson family. But, at any rate, the ground of my decision is that it is clear that Richard Norton Atkinson was not after the death of his father entitled to the possession or to the receipt of the rents, issues, and profits of the family estates at Cockerham, and, not being within the words of the exception, he cannot be deprived of the position in the succession given to him by the will. The explanation of the learned judge's error is not, I think, far to seek. This testator may have been a very learned conveyancer, but, judging

(1) 26 Ch. D. 382.

from the dispositions of his will, he could hardly have been a very wise man. The notion of carrying over an estate alternately from one family to another—from the Brandt family to the Atkinson family, and so on—was, I venture to think, one which no wise man would ever have entertained. Such a limitation, so long as it lasted, was pretty certain to bring about the maximum of heart-burning and jealousy between these two families, which were thus made to depend, so far as regards these estates, upon an accident. I cannot conceive that this disposition was anything but a blunder. But, if it were well intended, the testator's amiable intention was happily defeated, because the nephew Brandt died in the lifetime of the testator, never having been married, and having therefore no sons who could come in alternately with the Atkinsons.

On the whole, I am of opinion that the decision of the learned judge upon the construction of the clause was wrong, and that his order should be reversed.

VAUGHAN WILLIAMS L.J. I agree. After the exhaustive exposition of the law by so great a master of the subject as my brother Rigby, I hesitate to add anything. But I think I ought to say a few words, because, although I have arrived at the same result, I have not done so with as little hesitation as he has.

It is plain that this testator stood in no sense in loco parentis to those whom he intended to benefit by his will, and it is therefore clear that the rule which allows what has been called "a prodigious latitude of construction in favour of the truth and honour of the settlement" in the case of family settlements or dispositions made by a parent or a person in loco parentis has no application to the present case. That rule has no application outside cases of family settlement, as was laid down by Wood V.-C. in *Sandeman* v. *Mackenzie* (1), and is now acknowledged law. I therefore approach this will minded to construe it simply according to the testator's language, and to deduce his intention from the words to be found within the four corners of the instrument. I take it

(1) 1 J. & H. 613.

C. A. 1901 SHUTTLEWORTH v. MURRAY. Vaughan Williams L.J.

that the rule which has been applied to family settlements, in which equality amongst the children was held to be the overriding intent, was not an arbitrary rule adopted by the Court, but was merely an instance in which the Court held itself entitled and bound to depart from the primary sense of the words in consequence of the overriding intention to be gathered from the words and from the circumstances of the parties to the instrument. But although it has become, if I may say so, a stereotyped rule that in the case of family settlements you are to deduce that intention, and to employ even a prodigious latitude of construction, the general principle applies equally to all documents. In construing any document you are not bound by the primary and most natural meaning of the words, if from the document itself and the surrounding circumstances you come to the conclusion that the obvious intention of the author was such as to compel you to depart, or to justify you in departing, from the primary meaning of the words. And I confess that when I came to look at this will I thought it hardly possible that the testator could have intended that the son excluded by the exception, because he took a particular interest in the estates at Cockerham, should nevertheless take the benefit under the will when he had sold the Cockerham estates and had got the proceeds of the sale in his pocket. I therefore tried to see whether the words of exception would enable me to give effect to an intention which appears so inherently probable from the very introduction of the exception. For this reason, although I cannot pray in aid what I may call the family rule, which would enable me to give a prodigious latitude of construction to the words, I still think I am bound to see whether the words are sufficiently ambiguous to justify me in giving effect to an intention which I am disposed to attribute to the testator, not from any circumstances outside the will, but from the provisions of the will itself. But, having examined the words, I have come to the same conclusion as my brother Rigby—that the words are too strong.

As regards the first words, "except an eldest or only son for the time being," I feel no difficulty, and I think I am justified

in treating the words "for the time being" as defining merely the quality of the person who is to take. But then come the words "entitled to the possession or to the receipt of the rents, issues, and profits"; and there I feel a great difficulty. I should prefer to read those words as if they ran "entitled after the decease of the said Richard Atkinson under the disposition of the Cockerham estates," and so on. But the will is vague here. The testator does not tell us what the estates are. He does not say by what instrument the limitations were created under which Richard Atkinson was tenant for life, but leaves us entirely in the dark. This makes it extremely difficult to read the words as if the testator intended merely to describe the character of the person who was to be excepted.

Under these circumstances I read the words, as my brother Rigby does, in their natural sense, and so reading them I think it is impossible to say that R. N. Atkinson comes within the exception.

STIRLING L.J. I have arrived at the same conclusion. I do not think the will of this testator should be interpreted in accordance with the rules which have been laid down for the construction of instruments the object of which is to discharge that moral obligation of providing for children which falls upon parents or those who stand in loco parentis. In such cases the instrument, whether it be a marriage settlement or a will, is construed so as to carry out what Lord Westbury in *Collingwood* v. *Stanhope* (1) describes as "the great object of parties in making a provision for children, namely, that no one child should obtain a double portion at the expense of another." There is, however, a great body of authority which shews that this principle is to be applied only in cases of provision made by a parent or a person standing in loco parentis. That was so laid down by Lord Hardwicke in *Hall* v. *Hewer*. (2) It is again laid down in a judgment of great authority given by Maule J. in *Scarisbrick* v. *Lord Skelmersdale* (3), when with Rolfe B. he was advising the Chancellor of the Duchy of Lancaster on an appeal from the Chancery Court of that

(1) L. R. 4 H. L. 57. (2) (1753) Amb. 203, 204.
(3) 4 Y. & C. Ex. 78.

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Duchy. That case was carried to the House of Lords—*Wilbraham* v. *Scarisbrick* (1)—and the judges were summoned and their opinion was delivered by Wilde C.J., who said (2) that they had perused the judgment given in the Court below, in which they entirely concurred, and Lord Brougham and Lord Cottenham, who advised the House, both expressed their concurrence in the same judgment.

Lastly, the law is stated in the same way by Wood V.-C. in *Sandeman* v. *Mackenzie*. (3)

These are not the only cases on the point, but they are a sufficient sample, and it is unfortunate that, as appears from the report, the attention of Cozens-Hardy J. was not directed to any of them.

In the course of his judgment in *Scarisbrick* v. *Lord Skelmersdale* (4) Maule J. said (5): "It is not every act done by a parent which is to be construed on principles different from those which would have been applied if the same thing had been done by a stranger, but only those acts which the parent does in fulfilment of some natural duty. Now, though it is a natural duty incumbent on a parent to provide for his children, and in doing so to use language which will secure some provision for all, it certainly is no natural duty to cause estates to shift in one course of succession rather than another."

I come to the conclusion that in construing this present will the ordinary rules of construction ought to prevail, and the testator's language should be read in its ordinary meaning, for he certainly did not stand in loco parentis to Richard Atkinson or his children. Richard Atkinson was the testator's nephew, and Francis Frederick Brandt, the other object of his bounty, was also a nephew.

It must be observed that this will is of a somewhat capricious character, and does not indicate any very predominant intention of the testator. [His Lordship read the clause in the will, and continued:—]

In the first place, an excepted son is to be "an eldest or

(1) (1847) 1 H. L. C. 167.
(2) Ibid. 188.
(3) 1 J. & H. 613.
(4) 4 Y. & C. Ex. 78.
(5) 4 Y. & C. Ex. 117.

only son for the time being," for I think the words "for the time being" ought to be read in immediate connection with the words "eldest or only son." But what is the "time being" which is there referred to? It seems to me that, as the testator is dealing with a succession of life limitations, the time is that at which each limitation comes into operation on the determination of the prior limitation, and that in the present case was, in the events which happened, the death of Richard Atkinson. But the person excepted is not only to be "an eldest or only son" at that time; he is also to be "entitled to the possession or to the receipt of the rents, issues, and profits of certain estates at Cockerham after the death of Richard Atkinson as tenant for life or a greater estate."

In my opinion those words, read according to their natural meaning, point to an actual enjoyment after the death of Richard Atkinson of the Cockerham estates. At that period, however, the eldest son of Richard Atkinson was not entitled to the actual possession or receipt of the rents of the Cockerham estates, and he does not therefore fall within the words of exception taken in their primâ facie meaning. It is true that he had previously been entitled to the Cockerham estates for a greater estate than a life estate, and had by his own act deprived himself of that estate; but I cannot see that the testator has provided for that event, or that any manifest absurdity or inconsistency will result from reading the words in their natural sense. So far as appears by the will, it seems to me that the testator simply considered that a son who was in the actual enjoyment of the Cockerham estates would not in any way require his bounty.

In my judgment, therefore, the will ought to be so construed, and the decision of the learned judge ought to be reversed.

Solicitors: *R. B. Dods; Robins, Hay, Waters & Hay.*

W. L. C.

KEKEWICH J.

1901

March 4, 12.

POLLARD *v.* GARE.

[1900 P. 2168.]

Easement—Light—Derogation from Grant — Implication — Reasonableness—Plan shewing Building Line—Plots sold for Building—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

Where a landowner contracts to grant a lease of a vacant piece of land when a house of a specified character is built thereon, and accordingly a house is built and a lease of the house and land is granted, the doctrine that a grantor cannot derogate from his own grant must be applied, not to the vacant piece of land, but to the land with the house on it according to the contract, which must be taken for this purpose to have been fulfilled.

If the land forms part of a building estate, and the contract is entered into by reference to a plan in which the estate is marked out in building plots, with a building line marked on the plan so as to extend through all the plots, including the land which is the subject of the contract, the application of the doctrine is not thereby limited or restricted, and, in the absence of further evidence of the existence of a building scheme or of any reservation of right to the grantor, the purchaser from him of an adjoining plot will be restrained from building on his land so as to interfere with the access of light to the house as theretofore enjoyed.

Broomfield v. *Williams*, [1897] 1 Ch. 602, applied.

In and previously to August, 1883, Ellen Maria Walls and Ada Emma Walls were the owners in fee simple of land at Staines, in the county of Middlesex, fronting the river Thames and the towing-path thereof, and were proposing to let or sell the land for building purposes in plots having each a frontage to the towing-path of about sixty-six feet, and extending backwards from the river for a length about or slightly exceeding four times the length of the frontage.

By an agreement of August 24, 1883, between Mrs. Sophia Hartas (since deceased) and E. M. Walls and A. E. Walls, it was agreed that Mrs. Hartas, within a specified time, should build on two of the plots a house of a specified character, and that in consideration thereof E. M. Walls and A. E. Walls would grant her a lease of the land and house for a term of ninety-nine years from September 29, 1884, at a yearly rent of 10*l.* 10*s.* The agreement did not define the position in which

the house was to be erected by Mrs. Hartas on the plots, nor did it contain any reservation to the freeholders of any right to build on the adjoining plots in any particular manner, and the only material restriction imposed upon Mrs. Hartas was that she was not to erect any building within twenty feet of the frontage of the plots.

The negotiations for the agreement took place, and the agreement itself was entered into by reference to a plan shewing the two plots above referred to and plots adjoining thereto on either side, and indicating on all the plots a building frontage line at a distance of about twenty feet from the frontage to the towing-path of the river Thames.

Mrs. Hartas, in accordance with the agreement, erected a house called Rosedale on the land comprised therein. The house was erected wholly on one of the two plots. The side wall of the house was parallel with the boundary line of that plot, and at a short distance from a boundary fence four feet high separating the land of Mrs. Hartas from another plot adjoining her land on the north side thereof.

On September 29, 1884, E. M. Walls and A. E. Walls granted a lease to Mrs. Hartas of the land and the house thereon for the term and at the rent above mentioned. The lease contained no general words of grant, nor was there anything contained therein which indicated any intention to exclude the operation of s. 6 of the Conveyancing and Law of Property Act, 1881.

On May 13, 1887, the freeholders conveyed two plots of land, including the plot adjoining the land of Mrs. Hartas on the north, to the defendant Mary Ann Gare in fee simple.

Mrs. Hartas died on October 7, 1896, having by her will, dated July 19, 1892, devised and bequeathed all her real and personal estate to the plaintiff, Sydney Ratcliffe Pollard, and another, and appointed them her executors, and her will was duly proved by the plaintiff (his co-executor having renounced probate).

The defendant proceeded to erect upon her land a blank hoarding at a distance of about six feet from the side wall of the plaintiff's house, and of such a height as to obstruct

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the access of light to the kitchen window of the plaintiff's house.

The plaintiff thereupon brought this action for an injunction to restrain the continuance of the hoarding by the defendant, as being an infringement of the plaintiff's right to light.

By her defence to the action the defendant stated in effect that the hoarding had been erected by her in order to prevent the acquisition by the plaintiff of a right to the access of light over the defendant's land.

Upon the action coming on for hearing, it appeared that the desire of the defendant was to test the extent of her right to build upon her land, and that it was proposed by her to build upon the plot adjoining the plaintiff's house a house uniform in design with the plaintiff's house, with a side wall about twenty-eight feet high, and at a distance of about twelve feet from the plaintiff's kitchen window. His Lordship thereupon suggested that the pleadings should be amended so as to raise the question of the right of the defendant to build upon her land in the manner proposed by her, and in accordance with this suggestion the action stood over with a view to such amendment being made.

The pleadings were subsequently amended, and the plaintiff now claimed an injunction to restrain the defendant from building in the manner proposed.

It clearly appeared in evidence that the proposed building would seriously interfere with the access of light to the plaintiff's kitchen window. There was no evidence of the existence of any definite building scheme (further than as above mentioned) binding on the plaintiff.

There was evidence on the part of the plaintiff shewing, by reference to a plan prepared by his surveyor, that it was possible for the defendant to build upon her two plots two houses of a character substantially similar to the plaintiff's house, and in such positions that the access of light to the plaintiff's house would not be interfered with.

Renshaw, *K.C.*, and *Marcy*, for the plaintiff. This case is simply one in which an owner of two pieces of land conveys

one of them to the plaintiff with a house on it, and reserves no rights to himself, and the doctrine against derogation from grant is therefore fully applicable. It is said that there was a kind of building scheme under which it was intended that every one buying a plot should build a house upon it. We do not dispute that, but we say that there was no scheme or contract defining the position on the plot in which any house was to be built. The negotiations for the lease, and the plan by reference to which the agreement for the lease was made, amount to nothing more than a representation that the adjoining land was to be used as building land. From the time of *Swansborough* v. *Coventry* (1) to the present day it has been held that a statement made to a purchaser taking a conveyance of the first of a series of plots that the land retained by the owner is to be used as building land does not give to the vendor the right to build so as to interfere with the enjoyment by the purchaser of the property purchased. Here the only restriction as to building was that the purchaser, i.e. the lessee, was not to build within 20 feet of the frontage; and the cases of *Myers* v. *Catterson* (2) and *Broomfield* v. *Williams* (3), and other decisions there referred to, shew that in a case such as the present the vendor or his assign has primâ facie no right to build so as to obstruct the access of light to the house of the purchaser; that the right of the purchaser is primâ facie absolute, and the onus is on the vendor or his assign to shew some limitation of it. *Broomfield* v. *Williams* (3) is directly in point.

It is to be observed that the present case does not rest solely on implied grant. Sect. 6 of the Conveyancing Act, 1881, must be imported into the lease, there being no indication therein of any intention to the contrary, and therefore the lease operated to pass to the lessee all lights occupied or enjoyed with the demised house and buildings.

[Reference was also made to *Wilson* v. *Queen's Club*. (4)]

P. O. Lawrence, *K.C.*, and *Alexander L. Morris*, for the

(1) (1832) 2 Moo. & Sc. 362; 9 Bing. 305; 35 R. R. 660.
(2) (1889) 43 Ch. D. 470.
(3) [1897] 1 Ch. 602.
(4) [1891] 3 Ch. 522.

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defendant. The extent of the grant to the predecessor of the plaintiff ought to be ascertained by the Court as at the date of the agreement, and not at the date of the grant—i.e., the lease. In *Broomfield* v. *Williams* (1) the house was built by the grantor and not, as here, by the grantee. In this case the rights of the parties were defined by the agreement, and the conveyance came later, when the grantors had parted with the equitable interest. The facts of the present case are similar to those in *Birmingham, Dudley and District Banking Co.* v. *Ross*. (2) It would be a very strong thing to hold that a purchaser, buying a plot of land and knowing that the adjoining land is to be used as building land can, by building on his land, prevent the owners of both the adjoining plots from building in a line with himself. *Beddington* v. *Atlee* (3) shews that the date of the agreement is that which ought to be regarded. The real question is whether this case is governed by *Broomfield* v. *Williams* (1) or by *Birmingham, Dudley and District Banking Co.* v. *Ross*. (2) We submit that the latter case applies, and for two reasons. First, the facts in this case go far beyond *Broomfield* v. *Williams* (1), where the land was simply described as "building land." Here strips sixty-six feet wide were shewn on each side of the land of Mrs. Hartas, and when she entered into the agreement she could not reasonably suppose that the owners did not intend to grant the adjoining plots on the same terms, in respect to the right to build. Secondly, this was an agreement for a lease of a vacant plot of land, as in *Birmingham, Dudley and District Banking Co.* v. *Ross* (2); and, as Rigby L.J. pointed out in *Broomfield* v. *Williams* (4), the distinction ought to be clearly drawn between a case of that kind and a case in which the grantor builds the house and grants it with the windows in it.

Renshaw, K.C., in reply. The *Birmingham Case* (2) is not an authority to shew that the date of the agreement is the point of time at which the rights of the parties are to be ascertained. The contract there contained various matters which were not and could not be dealt with in the conveyance,

(1) [1897] 1 Ch. 602.
(2) (1888) 38 Ch. D. 295.
(3) (1887) 35 Ch. D. 317.
(4) [1897] 1 Ch. 616.

and they were referred to by the Court as evidence of the intention of the parties governing the whole transaction. In the present case, whether the rights of the plaintiff came under the agreement or under the lease, they were acquired long before the conveyance to the defendant, and she takes subject to the state of things existing at the time when she took her conveyance.

Cur. adv. vult.

March 12. KEKEWICH J. By the agreement of August 24, 1883, Mrs. Sophia Hartas, whose legal personal representative is the plaintiff, contracted with two ladies who were the common owners of the land the subject of that agreement, as well as of the land afterwards acquired by the defendant, that she would, within a specified time, build on the land the subject of that agreement a house of a specified character, and on the completion of such house, and in consideration thereof, the two ladies contracted to grant her a lease of the land with the house thereon on certain terms. The house was erected, and the lease was accordingly granted on September 29, 1884. There was some argument on the question whether the plaintiff's rights as against the grantors over the adjoining land depended on the agreement or on the lease executed in pursuance thereof. To my mind this question is of no material importance. From the date of the agreement Mrs. Hartas was entitled to a lease according to the terms thereof subject only to the fulfilment of her contract to erect a house. It was, of course, competent to the parties to waive or alter any of the terms on either side of the contract; but in fact nothing of this kind was done, and it must be taken that the grantors were satisfied with the performance by Mrs. Hartas of her part of the contract, while on the other hand she accepted the lease which was actually granted as a performance by the grantors of their part. For the present purpose, however, I will accept without more the contention of the defendant that the rights must be treated as fixed at the date of the agreement, namely, August 24, 1883.

That date accepted, it is strictly true that the two ladies

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agreed to grant, and Mrs. Hartas agreed to take, a lease not of a house, but of a vacant piece of land; but on that piece of land Mrs. Hartas had bound herself to build, as a condition precedent to the actual lease, a house of a specified character. The doctrine that a grantor cannot derogate from his own grant must be applied not to the vacant piece of land, but to the land with the house on it according to the contract, which must be taken for this purpose to have been fulfilled. The only question is whether the doctrine is, as regards the access of light, to be applied absolutely, that is, without limit or restriction, or whether any and what limit or restriction must be imposed. Of the many cases referred to I deem it necessary to mention only one—*Broomfield* v. *Williams*. (1) Study of that case reveals some differences of opinion which on some other occasion may require notice, but are immaterial here. The plaintiff in that case admitted or conceded, and it may be necessarily, that he could insist on the application of the doctrine in question only subject to certain restrictions embodied in the order of the Court of Appeal, but these restrictions were postulated by special facts of which we have no trace here. Even apart from these special facts, this case is far weaker in material for restriction than *Broomfield* v. *Williams* (1), which is an authority for holding that such material as there is does not justify any qualification of the doctrine that as regards access of light, with which alone we are concerned, a grantor must not derogate from his own grant. It was urged on the defendant's behalf that there was, to the knowledge of Mrs. Hartas at the date of her agreement, a building scheme affecting the land the subject of that agreement and the adjoining land. What that building scheme was nobody pretended to say, and it is clear that there was no building scheme as the phrase is generally used and understood. The estate was marked out on the plan, if not on the ground, in building lots, and there was also a building line marked on the plan so as to extend through all the lots; but these are just the facts which in *Broomfield* v. *Williams* (1) were held insufficient to restrict the application of the doctrine. The right to build

(1) [1897] 1 Ch. 602.

remains, but there is nothing from which it can be inferred that the grantors were to be at liberty to build in any particular place, or to build houses similar to that of Mrs. Hartas, so as to interfere with the access of light to the latter. If that be so, there is no room for considering what is reasonable, or rather what would have been reasonable if the parties had weighed it, and there can be no question of hardship, the defendant necessarily succeeding to the obligations as well as to the rights of her grantors.

Thus far the case has been treated as entirely depending on the application of the doctrine above quoted. But it may also be treated as depending on the 6th section of the Conveyancing Act, 1881. I am not concerned to determine whether the provision of that section can or cannot be imported into the agreement of August 24, 1883, so as to render it applicable to the house not then in existence, but thereby contracted to be built. I am by no means sure that it cannot. But we have the conveyance, that is the lease of September 29, 1884, dated after the erection of the house, and it is inconceivable to me that, whatever effect the agreement might have had in fixing the rights of the parties, the words of the statute ought not to be read into that conveyance. It seems to me impossible to say that you shall not import into the conveyance words which the statute has enacted shall be imported into it. There is clearly no intention to the contrary, and, if authority were needed for that, *Broomfield* v. *Williams* (1) here again comes to our assistance. The defendant fails from this point of view also.

The plaintiff is entitled to an injunction restraining the defendant from building on her land so as to interfere with the access of light to his house called Rosedale as hitherto enjoyed, and the defendant must pay the costs of the action.

Solicitors: *Sydney R. Pollard; Burton, Yeates & Hart, for Horne, Engall & Freeman, Staines.*

(1) [1897] 1 Ch. 602.

C. C. M. D.

COZENS-HARDY J.

1901

Jan. 29, 30, 31; *Feb.* 1, 4, 5, 6, 21.

MERTTENS *v.* HILL.

[1899 M. 702.]

Manor—Ancient Demesne—Freehold—Custom—Fine on Alienation—Foreigner—Evidence—Prescription—Statute Quia Emptores Terrarum (18 *Edw.* 1, *c.* 1).

The freehold of land held in socage of a manor of ancient demesne is in the tenant.

A manorial custom in a manor of ancient demesne to exact a fine on alienation to a foreigner (of arbitrary amount in its origin) held bad, under the Statute Quia Emptores Terrarum and otherwise, as being a restriction on the right of a freeman to alienate.

The plaintiff sued as lord of a manor and soke in ancient demesne, formerly vested in Henry VIII. The present existence of and the plaintiff's title to the manor and soke were disputed. The rolls of courts held on behalf of the plaintiff's predecessors going back to 1576 were produced.

The Court *held* the plaintiff's title to the manor established, if necessary by the presumption of a lost grant.

THIS was the trial of an action in which the plaintiff sued as lord of the manor and soke of Rothley, Leicestershire, which belonged to King Edward the Confessor and William the Conqueror, to recover from the defendant a customary fine on alienation in respect of a piece of land recently conveyed to him, and alleged to be within the ambit of the manor and soke.

In Domesday Book lands in twenty outlying vills are described as members of the manor and soke of Rothley; one such member is described as consisting of "three carucates of land less one bovate and a half" in Grimston, a vill several miles from Rothley. (1) The land in respect of which the action was brought was a piece of about twenty-one acres in extent called "the Wongs," situate in Grimston. The statement of right to the fine was pleaded in the following terms:—

"The plaintiff is entitled to a fine due according to the custom

(1) Fo. 230 *a*, col. 2. Rex tenet Rodolei. Rex E. tenuit. Ibi sunt .v. car[ucatae] terrae. . . . Huic manerio pertinent subsequentia membra.

Fo. 230 *b*, col. 1. In Grimestone .iii. car' terrae una bovata et dim' minus. . . . In his sunt .cc. et .iiii. sochemanni cum .clvii. villanis et nonaginta .iiiior. bordariis habentes quater .xxti car[ucas] et iias. et reddunt inter omnes xxxi. libras et viii. solidos et i. denarium.—F. P.

of the said manor and soke hereinafter referred to from every purchaser of tenements situate within the said manor and soke who is a 'foreigner'—that is to say of every person not already a sokesman or tenant of the said manor and soke at the time of such purchase for licence of entry into such tenements." . . . .

"By the custom of the manor and soke aforesaid any person becoming entitled in fee or for life whether by purchase devise descent or otherwise to any such tenement or tenements so holden of the lord of the said manor and soke is and ought to be summoned to appear at the court of the lord of the said manor and soke to take admittance according to the custom of the said manor and soke as a sokesman or tenant of the said manor and soke to the said tenement or tenements and to do his fealty suit and service for the same and to pay for and in respect of the said tenement or tenements and of the said suit and service the fees dues or payments therefor due and of right accustomed including in the case of every 'foreigner' that is to say of every person not already a sokesman or tenant of the said manor and soke a fine due and payable to the lord of the manor and soke for or in respect of the admittance of such 'foreigner' to his estate in the tenement or tenements so purchased by him as a sokesman or tenant of the said manor and soke and the title of any person so becoming entitled and in particular of any 'foreigner' becoming entitled by purchase to any such tenement so holden of the lord of the said manor and soke is incomplete unless and until it has been perfected by such admittance according to the custom as aforesaid."

"The said fine is according to the custom of the said manor a fine arbitrary for licence of entry into the said tenements. For 150 years and upwards the lords of the said manor and soke have accepted as a composition for such fines arbitrary a poundage (hereinafter referred to as 'poundage dues' or 'customary poundage') at the rate of one shilling in the pound on the amount of the consideration money paid by 'foreigners' for tenements purchased by them. The plaintiff is willing to accept such poundage as a composition for and in lieu of the said fine."

The plaintiff also pleaded that any purchaser who neglected

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on being duly summoned to appear at the customary court, or to do his fealty suit and service, was liable to be amerced by the jury or homage, and that such fine and amercement was recoverable by distress or action at law, and that if such foreigner neglected to take admittance the lord was entitled to seize quousque, and further that "By the custom of the said manor and soke every such 'foreigner' is further obliged before and as a condition of his said admittance to take a customary oath to the effect that he has not contracted or agreed for any further or greater purchase of lands or hereditaments than that to which he is then admitted within the said manor and soke."

The defendant denied that the plaintiff was lord of the ancient manor and soke of Rothley. It was the case of both sides that the ancient manor and soke of Rothley was vested in the Knights Templars, and afterwards in the Knights Hospitallers, down to the reign of King Henry VIII., when it was vested by Act of Parliament (32 Hen. 8, c. 24) in the King. The defendant pleaded that the effect of some one or more of subsequent royal grants (referred to in the judgment) was to destroy the old manor and soke of Rothley, at any rate so far as the Grimston member was concerned. The defendant pleaded that if in ancient times his tenement had been liable to the alleged customary payments, the tenements were released and discharged from the same, and were converted into free and common socage by reason of a certain agreement (dated 1245) and certain proceedings in the King's Court in the reign of Henry VIII. between the Master of the Temple and the men of the manor and soke of Rothley. The agreement and proceedings are referred to more particularly in the judgment.

The defendant pleaded that by the common law, declared by an Act of Edward II., it is unlawful for the lord of any manor and soke to exact any fine on alienation from his free tenants. The statute appears in the Rolls of Parliament, vol. i. p. 298, 8 Edw. 2. The following is a translation: "It is agreed and assented by the archbishops bishops abbots friars earls and barons and others of the realm in the Parliament of our Lord the King which was summoned at Westminster in the octave of St. Hilary in the eighth year of his reign that from henceforth

none should demand or take any fine from free men for entering upon the land and tenements which are of their fee, so always that by such feoffment they be not losers of their services nor that their services be denied."

The defendant further pleaded that the statutes affecting freehold tenures, including Magna Charta, Quia Emptores Terrarum and the Statute of Wills, are inconsistent with a right to the fine claimed.

He pleaded also that the alleged custom to exact a fine was void as being unreasonable, uncertain, and of modern origin.

There were in evidence rolls purporting to be rolls of the Court Leet and Court Baron kept on behalf of the plaintiff's predecessors in title as lords of the manor and soke, beginning in the latter part of the sixteenth century down to 1604, and from 1674 to the present time. Separate juries were sworn for Rothley proper and the outlying members, but one Court was held for the whole manor and soke. But the defendant contended that the entries as to outlying members related chiefly to the Court Leet. It was in evidence that descent according to the custom of the manor and soke was analogous to descent in gavelkind. Land passed by feoffments, grants, and common law assurances, and the mines and timber belonged to the tenant, who had an unrestricted right of leasing.

The Court rolls shewed that fines on alienation to strangers had been paid, including some instances in respect of land in Grimston. One entry was of the admittance in 1825 of one Mathew Needham to the Wongs and payment of a fine on the occasion. The greater part of the Wongs was allotted under the Grimston Inclosure Act (5 Geo. 3, c. lxviii.), which was passed in 1765.

The Inclosure Act is prefaced by the following recitals: "Whereas Grimston aforesaid is parcel of the manor and soke, and within the peculiar and exempt ecclesiastical jurisdiction of Rothley, otherwise Rodoly, in the county of Leicester, belonging to Thomas Babington Esq." . . . . "And whereas the said Thomas Babington, as lord of the manor and soke of Rothley, of and within which Grimston is a parcel and member as aforesaid, is not only intitled to the soil of all the waste grounds in Grimston

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aforesaid, but is also intitled to an Alienation Fine from every purchaser of Lands or Hereditaments within the said manor and soke, who hath not lands in the said manor at the time of such purchase, of one shilling in the pound for every pound of the consideration money for such purchase, and is also intitled to divers rents, fees, and other privileges and Royalties incident and belonging to the said manor and soke."

Swinfen Eady, K.C., Eve, K.C., and *Stuart Moore*, for the plaintiff. The plaintiff's title to the ancient manor and soke of Rothley actually goes back in the Babington family some hundreds of years, as is evidenced by the Court rolls kept on behalf of the Babingtons as lords of the manor and soke. Also, it is recited in the Inclosure Act of 1765 that Thomas Babington was lord of the manor.

[*Micklem, K.C.*, for the defendant. A recital in a private Act is no evidence against a stranger to the act: *Reg.* v. *Inhabitants of Haughton* (1); the recital would prove too much, for it makes the whole of Grimston in the manor and soke of Rothley, which clearly was not the case.]

It is said that the old manor and soke had been destroyed, or divided by some one or more royal grants previously to the rolls that are in evidence. The manor and soke was never destroyed; it may have been divided; it could be brought together again: *Marsh and Smith's Case* (2); *Morris* v. *Smith.* (3)

The plaintiff's predecessors have enjoyed the fruits of the manor and soke for so long that it will be presumed that it is vested in him, if necessary by lost grant: *Halliday* v. *Phillips.* (4)

The recent records shew that the Wongs is within the ambit of the manor and soke. The evidence establishes that the defendant is not a sokesman within the custom as alleged and proved. All the land in the manor and soke was in ancient demesne, in the nature of customary freehold. Tenants of land in ancient demesne were subject to special services and

(1) (1853) 1 E. & B. 501.
(2) (1585) 1 Leon. 26.
(3) (1585) Cro. Eliz. 38.
(4) (1889) 23 Q. B. D. 48, 56.

special privileges; they were exempt from jury service in the King's Courts; their lands were pleadable only in the Court Baron: 4 Coke, Inst. 269; Roll. Abr. I. p. 321; FitzHerbert's Natura Brevium, 11 F. The so-called freeholders in ancient demesne were really privileged copyholders, as were also customary freeholders in manors with ancient demesne. Tenure in ancient demesne is a copyhold tenure—not at the will of the lord, but the freehold is in the lord: 1 Blackstone's Law Tracts, 103, 121 et seq.; Watkins on Copyholds, 41, n.; *Perryman's Case*. (1) The Statute Quia Emptores and other statutes relating to freeholds do not therefore apply. There is no statute abolishing fines on alienation. Even if the land were freehold, we submit that a fine on alienation is not unlawful. There is an express provision in statute 12 Car. 2, c. 24, s. 6, to prevent abolition of fines for alienation. The defendant is a "foreigner" and must pay. A custom to pay an heriot in respect of freehold may be proved by notice of presentment in respect of those freeholds: *Damerell* v. *Protheroe*. (2) The agreement or document of 1245 did not put an end to fines on alienation to strangers for all time. The long-continued practice of paying such fines down to the present time supports this view.

Micklem, K.C., Wurtzburg, and *H. J. H. Mackay,* for the defendant. The plaintiff has not proved his title to the ancient manor and soke of Rothley. On the contrary, the royal grants through which he claims did not pass the manor of Rothley. The grant by James I. to Sewall, through whom plaintiff claims, is a grant only of the right to hold a Court Leet. The grant by Queen Elizabeth was of a right to take the common fine in the vill of Rothley only. As to common fine, see Termes de la Ley, sub voce; *Bullen's Case*. (3) We admit that down to the time of Henry VIII. the ancient manor and soke, which, according to Domesday Book, comprised less than half of the lands in Grimston, did exist, but by some one or more of the royal grants in evidence it was destroyed; it could not be re-created. There can be no presumption of an effectual grant

(1) (1599) 5 Rep. 84 a. (2) (1847) 10 Q. B. 20.
(3) (1603) 6 Rep. 77 b.

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of a manor shewn to have ceased to exist. In the present case most, if not all, of the land in that part of Grimston, which had been a member of the ancient manor of Rothley, is shewn to have been granted by the Crown to be held of the manor of East Greenwich in free and common socage. The plaintiff has failed to shew that the Wongs was in that part of Grimston which was a member of Rothley. Lands in ancient demesne are of freehold and not copyhold tenure. The lands in Rothley and its members pass by feoffment grant and common law assurances. The minerals do not belong to the lord, nor does the timber. The owner can lease as he pleases. Blackstone is by the more modern authorities admitted to be wrong in saying that socage lands in ancient demesne are, as to tenure, in the nature of privileged villein tenure: Watkins on Copyhold, 41, n. (Coventry's edition); Third Report of Real Property Commissioners, (1832) p. 12; Williams on Seisin of the Freehold, p. 31. The Wongs has always been conveyed and dealt with as freehold. If the custom was, as alleged, a right to an arbitrary fine, it was released as a villein custom, so far as Grimston is concerned, by the composition in the reign of Henry III.: *Doe* v. *Huntington* (1); *Griffith* v. *Clarke*. (2) Entries in Court rolls are evidence against the lord or against the tenants of a manor only, but do not bind third persons: *Attorney-General* v. *Lord Hotham*. (3) The alleged custom is void as being uncertain, unreasonable, of modern origin, and in restraint of a freeman's right to alien, both according to the common law declared by the Act 8 Edw. 2 and under the Statute Quia Emptores Terrarum, and other general Acts applicable to freeholds: *Wood* v. *Lovatt* (4); *Case of Tanistry* (5); 7 Vin. Abr. 189; Coke, Compleat Copyholder, s. 33; Calthrop, Relation between Lord of a Manor and the Copyholder, pp. 17, 24, 26. All general statutes apply to lands in ancient demesne: 4 Coke, Inst. 270. A custom cannot be set up against an Act of Parliament: *Noble* v. *Durell* (6); *Truscott* v. *Merchant Taylors' Co.* (7) In copyholds, a special

(1) (1803) 4 East, 271.
(2) (1583) Sir F. Moore, 143.
(3) (1823) T. & R. 209, 217; 24 R. R. 21.
(4) (1796) 6 T. R. 511.
(5) (1607) Davies, 78.
(6) (1789) 3 T. R. 271.
(7) (1856) 11 Ex. 855.

custom must be proved to support a claim for a fine on licence to alien or to enter: *Yaxley* v. *Rainer*. (1) If the Wongs were ancient demesne of Rothley, it was made frank fee by the fine levied in the Court of Common Pleas by Jane Kirkby in 1816. The fine on alienation sued for is only alleged to be payable on alienation to a "foreigner." The defendant is not a "foreigner."

Eve, K.C., in reply. The fine levied by Jane Kirkby in 1816 itself establishes the fact that at that time the Wongs was considered to be within the manor and soke of Rothley. Search has been made, and judgment in an action of *Babington* v. *Needham* (2) has been found annulling the fine: therefore the land is still held in ancient demesne, and is not frank fee.

[*Micklem, K.C.* It would appear that the fine levied by Jane Kirkby was to bar her estate tail. The judgment in *Babington* v. *Needham* (2) was by confession of Needham after he had voluntarily applied in 1825 for enrolment of the conveyance made to him. The action of *Babington* v. *Needham* (2) appears from the judgment to have been a personal action for damages, which were remitted to Needham upon his confession of judgment. The proper remedy for the lord was by writ of disceit, which was a writ in a real action. There is no reference to the action of *Babington* v. *Needham* (2) in the Court rolls or any of the documents in the plaintiff's possession.]

Feb. 21. COZENS-HARDY J. This action is brought to try the right of the plaintiff as lord of the manor and soke of Rothley, in the county of Leicester, to a fine of 1*s*. in the pound on the purchase-money paid by the defendant for certain property situate at Grimston known as "the Wongs." My attention has been directed to a mass of ancient documents, and some of them will require special mention. It will, however, be convenient in the first instance to state the propositions, at least six in number, which are asserted by the plaintiff and denied by the defendant.

(1.) That the plaintiff is lord of the ancient manor of Rothley. (2.) That the Wongs is within the ambit of the

(1) (1695) 1 Ld. Raym. 44. (2) (1826) Not reported.

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manor. (3.) That the Grimston tenants of the manor are only privileged copyholders, and that the freehold is in the plaintiff as lord. (4.) That by the custom of the manor all such tenants are bound to pay a fine of 1*s.* in the pound on alienation by way of sale to a "foreigner," or alternatively that the "foreigner" is bound to pay such a fine on entry. (5.) That the defendant is a "foreigner" within the meaning of the custom. (6.) That the custom is good in law.

I propose to deal with these propositions separately as far as may be.

(1.) It appears from Domesday Book that William the Conqueror then held the manor of Rothley and that King Edward had held it. To the manor pertained twenty members, of which Grimston was one. "In Grimestone are three carucates of land less one bovate and a half." In these members there were stated to be "204 sochemanni with 157 villani and 94 bordarii, having four score and two ploughs, and they render among them all 31*l.* 8*s.* 1*d.*" (1) It follows from what I have stated that it was "ancient demesne," and that the tenants had certain rights and privileges peculiar to that tenure. The manor was granted by the Crown to the Templars, who had also the adjacent manor of Dalby. Both manors continued in their hands or the hands of the Hospitallers until 1540, when they were vested by statute in the Crown. The dealings of the Crown, so far as Rothley and Grimston are concerned, were peculiar. In 1543 King Henry VIII. granted to Henry Cartwright (inter alia) "all that the site of our manor of Rothley." The grant included, not all the demesne lands of the manor, but only such as were then or late in the tenure or occupation of Humphrey Babington or his assigns under a twenty-nine years' lease from the Hospitallers in 1530 reserving a rent of 6*l.* 13*s.* 4*d.* The grant to Cartwright was to hold in chief by the service of the thirtieth part of one knight's fee and rendering a yearly rent of 13*s.* 4*d.* in respect of the site of the manor. This grant to Cartwright did not pass the manor, nor, on the other hand, did it extinguish the manor. But the lands granted were severed from the manor.

(1) See the text in note, p. 842, above.

Whatever passed to Cartwright is apparently vested in the plaintiff.

In 1544 Henry VIII. granted the manor of Dalby to Andrew Nowell to hold in chief. The manor of Dalby included part of Grimston. In 1553 Edward VI. granted certain lands in Grimston, part of the possessions of the late monastery of Kyrkbybellers, to Wright and Holmes as of the manor of East Greenwich in free socage and not in chief. In 1561 Queen Elizabeth granted to Cave and Williams all her remaining lands in the vill of Rothley, and certain rents reserved on prior grants out of other lands in the vill, in free socage and not in chief. This grant did not pass the manor. Whatever passed by this grant is apparently vested in the plaintiff. In 1564 and 1576 certain lands in Grimston formerly belonging to the dissolved monastery of Launde and to the dissolved monastery of Kyrkbybellers, were granted by Queen Elizabeth to persons through whom the plaintiff does not shew title. In 1590 Queen Elizabeth granted to Forcett and Best certain land and rents in Grimston to hold in free and common socage. In 1609 James I. granted to Sewall and others, through whom the plaintiff claims, all the perquisites of Courts of the lordship or preceptory of Rothley. In 1670 Charles II. granted to Lord Hawley and others certain rents arising from that part of Grimston which was within the manor of Dalby.

There is nothing in any of the Crown grants which suffices to pass the manor of Rothley. On the other hand, it appears that manor courts have been held by the plaintiff's predecessors in title since 1576, if not earlier, without interruption, except during a period from 1604 to 1675, when no Court rolls are forthcoming. It is recited in the Grimston Inclosure Act of 1765, that Thomas Babington, through whom the plaintiff claims, was lord of the manor and soke of Rothley, and a good paper title is shewn from the beginning of this century. Under these circumstances, I think I must hold that the plaintiff has sufficiently established his title as lord of the ancient manor of Rothley, notwithstanding the gaps above referred to. If necessary, a lost grant from the Crown must be presumed.

(2.) Is the Wongs within the ambit of the manor of Rothley?

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This is, in my judgment, extremely doubtful. It is clear that only part, and probably only a small part, of Grimston ever was within the manor of Rothley. The various Crown grants above referred to, and also certain Minister's accounts which have been put in evidence, satisfy me of this. The plaintiff strongly relies upon the Inclosure Act of 1765, under which "the Wongs" (except a small portion) was allotted to a predecessor in title of the defendant. Now a mere recital in a local and personal Act of Parliament, though admissible against persons claiming under the Act, is not conclusive, and the Court is at liberty to consider the fact or the law to be different from the statement in the recital: see *Reg.* v. *Inhabitants of Haughton.* (1) I am satisfied that the recitals in the Inclosure Act were inaccurate in treating the whole of Grimston as parcel of the manor of Rothley. And it is remarkable that there is no entry on the rolls of the Court relating to the Wongs until 1825, although in the interval of sixty years since the Inclosure Act, there had been many devolutions or dispositions of the property. But as against the defendant I think there is evidence upon which I must act. The defendant claims title through Jane Kirkby, who in 1820 conveyed to Matthew Needham. Now in 1816 Jane Kirkby levied a fine of her land in Grimston in the Court of Common Pleas. The effect of this was to make the land, if then ancient demesne, frank fee. But in November, 1825, Matthew Needham was admitted tenant to the Wongs, and in 1826, by a judgment in an action of *Babington* v. *Needham* in the Court of Common Pleas, the fine levied in 1816 was annulled, reversed, and made wholly void, on the ground that the lands in question were only pleadable in the manor court by writ of right close and not elsewhere. The subsequent dealings have not been wholly consistent, but I think I must hold—as against the defendant, and in the absence of any proof as to the boundaries of the manor—that the Wongs is within the ambit of the manor.

(3.) What is the legal position of the tenants of the manor? The tenure in ancient demesne is in many ways peculiar, and

(1) 1 E. & B. 501.

it is not possible to reconcile all the authorities. The clearest and best description is contained in the third report of the Real Property Commissioners, pp. 12–14, of which the following is an extract: "There is great confusion in the law books respecting this tenure. All agree that it exists in those manors and in those only which belonged to the Crown in the reign of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated Terræ Regis. But the copyholders of these manors are sometimes considered tenants in ancient demesne, and land held in ancient demesne is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders of the manor who are truly tenants in ancient demesne, and land held in ancient demesne passes by common law conveyances without the instrumentality of the lord. The copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not hold of the manor. They form the Customary Court. The Court of Ancient Demesne, which is analogous to the Court Baron, is constituted by those who hold in socage of the lord of the manor. . . . The tenants in ancient demesne, properly so called, were made subject to certain restraints and entitled to certain immunities. . . . They were forbidden to bring or to defend any real action touching their tenements, except in the lord's Court. . . . In ancient demesne there are no subdivided and conflicting interests in the soil. The timber and minerals belong to the tenant, and the rents, fines, and services due to the lord are certain." Applying this passage, I think the freehold is in the tenants, and not in the lord. But, apart from that high authority, I arrive at the conclusion for several reasons. (*a*) They are called "free tenants" in very early documents. (*β*) Their tenements ordinarily passed by feoffment, with livery of seisin, and not by surrender. (*γ*) They used the writ of right close, which seems to have been only available to freeholders. According to FitzHerbert's Natura Brevium, 11 F, a writ of right close is a writ which is directed unto the lord of ancient demesne, which lieth for those tenants within ancient demesne who hold their lands by charter in fee simple, or in

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fee tail, or for life, or in dower. (1) But it does not lie for copyholders. (δ) They disposed of their tenements by will, without any surrender to the use of the will. The Statute of Wills of 1540 only applied to lands holden "in socage or of the nature of socage tenure" or to lands holden by knight's service. It did not extend to copyholds. Now devises of the tenements are found soon after 1540. I have not traced any will prior to that date. If there be an entry of an earlier will, it must be due to a custom in the manor analogous to the custom of gavelkind. (ε) There is no trace of any claim by the lord, until quite modern times, to either timber or minerals, and on the other hand there are express dealings by the tenants with minerals. (ζ) The Inclosure Act of 1765 speaks of them as owners and proprietors who are "seised" of their land, and recognises their right to trees growing on their land.

(4.) As to the custom of the manor relied upon by the plaintiff. Among the documents produced by the plaintiff is one purporting to be a copy of the old customary of Rothley with the soke. The copy is apparently dated in 1527, but from internal evidence I gather that the original must have been much earlier. It states the customs as to descent and dower, which are different from the common law rules and are very like gavelkind customs. It then proceeds as follows: "Item sciendum est quod si aliquis velit terram suam vel partem ex ea dare vel vendere alicui infra sokam bene licet ei set *extra sokam nequaquam* et quando dat illam oportet quod in plena curia fiat donacio et seisina tradetur et tunc irrotulabitur in rotulo curiæ modus donacionis." This seems to me to be an absolute prohibition of alienation except to a person infra sokam, whatever that may mean. This is substantially repeated in an English customary of 1608. In 1579 there is entered on the rolls a verdict of the jurors "for Rothley only" as to the Court Baron, which may be translated as follows: "Who say upon oath as to divers questions or articles touching the customs within the soke and vill aforesaid concerning which, among other things, the same jurors are charged, first,

(1) And see Old Natura Brevium, *sub tit.* Briefe de recto clauso, fo. 11, ed. 1584, where these tenants are called sokemen.—F. P.

that an extrinsecus or one born without the soke, or one born within the soke between persons who are not free tenants within that soke and tenants of that manor by the custom of the manor cannot acquire any lands or tenements within this soke unless they shall have first made a fine (finem fecerint) with the lord for such lands and tenements and such purchase be acknowledged in the full Court of the lord in order that it may be enrolled in the Court rolls; and as to the second article they say that children of natives (liberi indigenorum) from their very cradles are heritable to purchase any lands within the soke although they may not have been previously presented to be heirs by descent feoffment or by testament of the father or any other ancestor if they shall afterwards be presented so to be, and to the third article they say that extrinseci et forenses nati or those born within the soke of such parents as have not any lands or tenements by hereditary right or by their own acquisition cannot become free within the soke nor can their sons by the custom of this soke inherit or possess their lands unless they previously agree with the lord for their fine and such their estate be inquired into by the homage and found and afterwards enrolled in the Court rolls although such purchasers or buyers have full seisin from the vendors." I am not satisfied that this verdict purports to relate to anything beyond the customs of "Rothley only" as distinct from Grimston and certain of the members. But however that may be, it differs materially from the two customaries, one prior, the other subsequent in date. And the verdict itself is extremely difficult to understand. Put most favourably for the plaintiff, it is a statement that an extrinsecus cannot purchase, unless he first makes terms with the lord, who can refuse consent altogether, or can exact such terms as he thinks fit as the price of his consent. There is an addition in English, at the foot of a Latin survey of the manor dated 1360, which says: "Then if an alienation be made to a stranger of any lands or tenements in Rothley without the lord's excuse, the fine for such alienation shall be arbitrable between the lord and the tenant." I doubt the authority of this addition, but it will be observed that it is not consistent with the custom

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as pleaded. It draws no distinction between a purchaser for value and a voluntary alienee. There is no trace of a fixed fine at the rate of 1*s.* in the pound until 1675. On the other hand the Court rolls contain very numerous entries, mainly, but not entirely, in Rothley proper, from the fourteenth century downwards, of fines paid "for entry" because he was "extraneus" or "extrinsecus" or "forinsecus," or a "foreigner" or a "stranger." For the most part the persons paying these fines were purchasers; but there are not wanting instances of fines paid by persons who were not purchasers but heirs or devisees, and by purchasers who apparently were not "foreigners." The Inclosure Act of 1765 contains a recital that the lord "is intitled to an alienation fine from every purchaser of lands or hereditaments within the said manor and soke, who hath not lands in the said manor at the time of such purchase, of 1*s.* in the pound for every pound of the consideration money for such purchase." It will be observed that this recital does not agree with any of the ancient documents as to the definition of a "foreigner." So far as concerns the oath which the plaintiff pleads as part of the custom, there is no record of it until 1768. Nor is there any record of an actual seizure quousque by the lord to enforce payment of a fine from a "foreigner." In my judgment the custom as pleaded is not proved.

(5.) Is the defendant a foreigner within the meaning of the alleged custom? Now, it is proved that he was born within the manor and soke, at his father's house, but the father never owned any land within the manor and soke. In the middle of the sixteenth century there are a number of entries stating that no fine was paid "because he was born within the soke." I find no trace of the addition which is contained in the verdict of 1572—namely, "born within the soke of parents who have lands within the soke." And some of the entries seem to be inconsistent with this addition. Upon the whole, I think that it is not proved that the defendant is a foreigner within the meaning of the alleged custom.

(6.) Is the alleged custom good in law? Now, if the freehold is in the tenants and not in the lord, as I hold it is, I think it

is bad as inconsistent with the nature of the estate and as a restraint upon alienation. The plaintiff is driven to rely not on the comparatively modern 1*s.* in the pound composition, but upon an absolute right to prohibit alienation except to a person who is not "a foreigner," and to exact a fine as the price of his assent to an alienation to "a foreigner." This is inconsistent with the statute 18 Edw. 1, Quia Emptores, which enacts that, from henceforth, it shall be lawful to every freeman to sell of his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the same chief lord by the same services and customs as his feoffor held before. It is also inconsistent with an Act of Parliament of 8 Edw. 2, which is found in the Parliament Roll, vol. i. p. 298, though not printed in the Statute Book, and which counsel for the plaintiff admitted to be or to have the effect of a statute (see 4 Inst. 50). It enacts "that from henceforth none should demand or take any fine from freemen for entering upon the lands and tenements which are of their fee, so always that by such feoffment they be not losers of their services nor that their services be denied." It was faintly urged that, by custom, a fine may be payable on the alienation of a freehold, but the only authority in support of this contention was a dictum in *Damerell* v. *Protheroe.* (1) "In *Mayne* v. *Cros* (2), the right to a fine on alienation of lands held in fee simple, within the honour of Gloucester, was considered valid." On referring to the Year-book it seems that no such point was decided. Moreover, no such custom can, in my opinion, hold good against the express language of the statutes I have referred to. I do not pause to consider whether this custom is bad also for uncertainty.

I have thus far drawn no distinction between Rothley proper and Grimston, which is one of the members, but the defendant lays great stress upon the distinction. It seems that in 1245 a composition and agreement was made between the master of the Templars and the reeve of Grimston for himself and for the men of the same vill (as also for the men of certain other members) in the following terms: "That they ought to increase

(1) 10 Q. B. 20, 25. (2) Year-book, Mich. (14 Hen. 4), fol. 2 *b*, pl. 6.

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their ferm beyond the ferm which they were wont to render to the master of the Knights of the Temple in England, to wit, for every carucate of land which they hold in the aforesaid vills three shillings by the year for all works, tillages, and other villein customs which the said master exacted from them, and that they ought to come to the view of frank pledge and do suit at the Court of the aforesaid master of Rothley when any should be there impleaded by the Lord King's writ of right, and when a robber is to be there indicted by afforcement of the Court, and all those who are of the body (de corpore) of the manor of Rothley ought to do suits and all other villein customs which, before they were accustomed to do, to the same master, &c." This composition was entered on the rolls of the King's Court. Its validity was expressly acknowledged in 1285. In that year a writ was issued in the King's Court claiming a moiety of some land in Wartnaby, one of the members, like Grimston, affected by the composition. The then master of the Templars took proceedings before the justices in eyre, at Leicester, to enforce his claim to exclusive jurisdiction. The Court held that the composition had not "changed any estate of the same men in respect of the aforesaid custom of impleading, nor to them remitted or quit claimed the aforesaid custom." It was considered that the plaintiff should take nothing by his writ but be in mercy for false claim, and that he should sue by another writ, to wit the little writ of right close according to the custom of the manor, if it seemed expedient to him. This decision does not seem to me to have the effect which the plaintiff attributes to it. It only decided that, the land being within the manor, the writ of right close must still be used. This was not a villein custom touched by the composition. It does not decide anything beyond this. The defendant asserts (*a*) that any such custom as is alleged by the plaintiff was a "villein custom," which was expressly released by the composition, and that, even if it is still in force in Rothley proper, it is gone so far as Grimston is concerned. I agree with this contention. He also asserts (*β*) that the effect of the composition was to extinguish the ancient demesne tenure and to turn it into free and common socage. The case of *Griffith*

v. *Clarke* (1), which was approved by Lord Ellenborough in *Doe* v. *Huntington* (2), tends to support this contention. In that case it was adjudged that the effect of a release in the time of Edward II. by the lord of a manor in ancient demesne to one who was tenant "de omnibus servitiis et consuetudinibus, salvis servitiis infra scriptis, viz. pro unâ 'virgatâ' terræ 2*s*. rent sect curiæ et relevio" (suit of Court and relief)—was an extinguishment of the custom of ancient demesne, but the rent suit of Court and relief continued by the saving.

I doubt, however, whether the decision of 1285 is consistent with the view that the land at Grimston was made frank free by the composition of 1245. I may add that it is remarkable that there is no entry of any alienation fine in Grimston prior to 1528, and that there are but few in Grimston until comparatively modern times, the great majority being in Rothley proper. Upon the whole, I think that even if the conclusion at which I have arrived is wrong as to Rothley proper, it is right as to Grimston, having regard to the composition of 1245. The result is that, in my opinion, the action fails, and I must give judgment for the defendants with costs.

Solicitors: *Millington & Drew, for Macaulay & Bennett, Leicester; Stileman & Neate, for Latham & New, Melton Mowbray.*

(1) Sir F. Moore, 143.

(2) 4 East, 290.

D. P.

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March 1.

In re NEW GOLD COAST EXPLORATION COMPANY.

Company—Winding-up—Application to Remove Liquidator—Circularising Shareholders—Contempt of Court.

In a voluntary winding-up a shareholder took out a summons on behalf of himself and the other shareholders of the company asking for the removal of the voluntary liquidator from office, and in support filed an affidavit stating what he alleged to be the facts justifying the application. Before the summons came on for hearing he issued a circular to the other shareholders, in substance repeating what he had stated in the affidavit, and asking the shareholders to support his application. The liquidator then served notice of motion for an injunction to restrain the issuing of the circular or any other like document, on the ground that it was a contempt of Court :—

Held, that the circular could not in any way interfere with or prejudice the due trial of the matter, and was not a contempt of Court, and that the liquidator's application must be dismissed.

Semble, that *Coats* v. *Chadwick*, [1894] 1 Ch. 347, so far as it decided that the plaintiff had been guilty of contempt, and *In re Crown Bank*, (1890) 44 Ch. D. 649, were not rightly decided.

In the voluntary winding-up of the New Gold Coast Exploration Company, Limited, Saunders, one of the shareholders of the company, issued a summons, purporting to be on behalf of himself and the other shareholders of the company, asking that Strong, the liquidator in the voluntary winding-up, might be removed from office. In support of the summons Saunders filed an affidavit stating what he alleged to be the facts justifying the removal of the liquidator. Before the summons came on for hearing, Saunders issued a circular to the other shareholders, in substance repeating what he had stated in his affidavit, and asking them to support his application.

Strong then served notice of motion for an injunction to restrain Saunders from distributing the circular or any other like document, and in the alternative that he might be committed for contempt of Court.

Eve, *K.C.*, and *W. H. Cozens-Hardy*, in support of the motion. It is settled law that the Court has jurisdiction to

restrain the publication of anything which is calculated to prejudice the decision, and so interfere with the due administration of justice. The circular is a contempt of Court.

[COZENS-HARDY J. It seems to me, at first sight, that the respondent is taking the only course he can pursue to obtain the support of his co-shareholders. He referred to *Plating Co.* v. *Farquharson.* (1)]

In *Coats* v. *Chadwick* (2) Chitty J. restrained the issuing of a circular discussing the merits of pending proceedings. Circulating copies of a pleading, reflecting on the other side, amongst persons who are not parties to the proceedings, is a contempt of Court: *Bowden* v. *Russell.* (3) And North J. held it to be a contempt of Court to publish newspaper comments with reference to a pending winding-up petition: *In re Crown Bank.* (4)

[They also referred to *In re General Exchange Bank* (5); *Kitcat* v. *Sharp.* (6)]

P. Rose-Innes, for the respondent Saunders. The respondent is acting bonâ fide with the simple intention of informing his co-shareholders of facts sworn to, for the purpose of obtaining fairly the co-operation of the other shareholders. The communication of these facts to the other shareholders is privileged. If there was anything malicious or untrue in the statements made, the applicant might have his remedy by an action of libel; but it is ridiculous to say that the statements are a contempt of Court, or likely to influence the decision of the judge. *Plating Co.* v. *Farquharson* (1) is an authority in my favour; and *Reg.* v. *Payne* (7) shews that the older cases as to the publication of statements with reference to pending proceedings amounting to contempt of Court have gone too far.

Eve, K.C., in reply, referred to *Cann* v. *Cann* (8); *In re Sir John Moore Gold Mining Co.* (9)

(1) (1881) 17 Ch. D. 49.
(2) [1894] 1 Ch. 347.
(3) (1877) 46 L. J. (Ch.) 414.
(4) 44 Ch. D. 649.
(5) (1866) 14 L. T. 582.
(6) (1882) 48 L. T. 64.
(7) [1896] 1 Q. B. 577.
(8) (1754) 3 Hare, 333, n.
(9) (1877) 37 L. T. 242.

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COZENS-HARDY J. In my judgment this application is misconceived. There is a voluntary winding-up of this company, and Mr. Strong is the liquidator. [His Lordship stated the effect of the summons issued by Saunders, and continued:—]

It purports to be, and is on the face of it, an application by Mr. Saunders, not merely as an individual, but on behalf of himself and the other shareholders of the company. The other shareholders are in fact co-applicants with him. They are a very numerous body, and they are not joined individually as applicants; but the summons purports to be, and I certainly do not mean to express an opinion that it is not properly, an application by Mr. Saunders, not in his individual character, but on behalf of himself and all the other shareholders. Mr. Saunders has filed an affidavit and obtained an injunction under certain circumstances, about which I say nothing; I do not wish any word to fall from me which will indicate any view as to what may be the decision on Mr. Saunders' summons when it comes before Wright J.

But, that being the case, Mr. Saunders issues a circular, which he sends, not to the public at large, not to persons who are in no way interested, but simply to individuals who are co-applicants with him. He sends it to the shareholders, and informs them of what he has done, and incloses a form asking them to testify as follows: "We the undersigned, being shareholders in the above company, do hereby testify our consent and approval of the proposed removal of Ernest Edward Strong as liquidator of the company and the appointment of some fit and proper person in his place, as asked for by the summons herein."

It is said that the statements in the circular—which I have read—are not well founded, and will not prove to be true. That may be so. I am not now considering whether it is or is not a libellous circular. I am only asked to consider, and I can only consider, whether this is or is not a contempt, in the view of the Court, as being calculated to interfere with the due administration of justice. Put in that way, I am bound to say that I think the question admits of only one possible answer.

I regard it as ludicrous to say that this circular will in any way interfere with or prejudice the due trial of this matter.

Now, certain reported decisions have been cited, in which, no doubt, judges have taken a view on the subject of contempt which, I have very high authority for saying, would not now be followed by the Court. I think that the guiding rule is to be found in the case, which I mentioned during Mr. Eve's opening, of *Plating Co.* v. *Farquharson* (1), in which the Court of Appeal—a very strong Court of Appeal—laid down some doctrines which I intend to follow. It is true that in that case the motion was made against proprietors of newspapers for publishing what was said to be a contempt, but James L.J. said: "If the motion had been made against the defendant himself, I think it must have failed." Cotton L.J. said: "I should like to add one word, namely, that I entirely disapprove of motions to commit where there is no real case for committing the party against whom the motion is made, and where the counsel in opening the case says, 'I do not ask for a committal; all that I ask for is an apology and payment of costs.' Motions made in that sense and view are, in my opinion, a mere waste of the time of the Court, and ought to be discouraged. My own view is that where there is no case for a committal the party moving ought to have no costs of his motion. I mention this upon the present occasion that the Court of Appeal may not in future be troubled with motions where there is really no case for committing the person against whom the motion is made." Sir George Jessel said: "I think I ought to express my entire concurrence with what Lord Justice Cotton has said." James L.J. went further. He said: "I certainly in such cases would not only not give the party moving his costs, but I should be inclined to make him pay costs. I think these motions are a contempt of Court in themselves, because they tend to waste the public time." It does not rest there. As Mr. Rose-Innes has called to my recollection, the whole matter came before a Divisional Court, consisting of Lord Russell of Killowen C.J. and Wright J., in *Reg.* v *Payne* (2)—a criminal case in which, probably, it was

(1) 17 Ch. D. 49, 56. (2) [1896] 1 Q. B. 577, 580.

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more strictly the duty of the Court to prevent any interference with the course of justice than in civil cases. In that case the late Chief Justice said: "We have been referred to certain cases in the Chancery Division of the High Court as authorities in support of the present application. I will not refer to those decisions further than to say that, in my opinion, in some instances, the Courts have gone rather too far." The cases which had been cited to the Court, to which those observations were addressed, were *In re Crown Bank* (1) and *Coats* v. *Chadwick* (2), two of the cases which have been relied on by the counsel for the applicant in the present case. The Lord Chief Justice also cites the following passage from the judgment of Cotton L.J. in *Hunt* v. *Clarke* (3), in which, after referring to the judgment of Jessel M.R. in *In re Clements* (4), he said: "Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider, and in my opinion although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the Court in interfering by this summary and arbitrary process." I think every word of that passage applies to the present case. I think that there is here no ground whatever for invoking the aid of the Court on the footing of contempt, and that the application must be made on that footing in order to succeed. In my judgment the application fails, and must be dismissed with costs.

Solicitors for liquidator: *Cox & Lafone.*

Solicitors for Saunders: *Valpy, Peckham & Chaplin.*

(1) 44 Ch. D. 649.
(2) [1894] 1 Ch. 347.
(3) (1889) 58 L. J. (Q.B.) 490, 493.
(4) (1877) 46 L. J. (Ch.) 375.

F. E.

LLOYD'S BANK *v.* PEARSON.

COZENS-HARDY J.

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Feb. 22, 23, 25; *March* 6.

[1900 L. 196.]

Mortgage—Chose in Action—Land held by several Persons on Trust for Sale—Mortgage of Beneficial Reversionary Interest of one of Trustees—Absence of Notice to other Trustees—Subsequent Mortgage with Notice to Trustees—Priority.

Land was settled upon trust to sell the same and pay the income to X. for life, and after her death to divide the proceeds among her children, one of whom was P. P., being then one of the three trustees of the settlement, in the lifetime of X. and before the land was sold, mortgaged his share to G., but no notice of this mortgage was given to the other trustees. P. subsequently (concealing the mortgage to G.) mortgaged his share to the plaintiffs, who made inquiry of the trustees as to prior incumbrances, and themselves gave notice of their own mortgage to the trustees.

Held, (1.) that, having regard to the trust for sale, the principle of *Dearle* v. *Hall*, (1823) 3 Russ. 1; 27 R. R. 1, applied; (2.) following *Browne* v. *Savage*, (1859) 4 Drew. 635, that the mortgage of the plaintiffs had priority over that of G.

By an indenture of settlement dated May 3, 1872, freehold property at Eastbourne was vested in Henry Stapley, Edwin Stapley, and Stephen Steele, upon trust, at the request in writing of Ellen Elizabeth Pearson, the wife of Thomas Pearson, during her life, and after her death at the discretion of the trustees, to sell the same, and to invest the moneys to arise from the sale and pay the income to Mrs. Pearson for her life for her separate use, without power of anticipation, and after her decease to stand possessed of the trust moneys and securities, and the interest, dividends, and income thereof, in trust for all the children of Mrs. Pearson at twenty-one or marriage. The rents and profits until sale were to be paid and applied as income. The property had not been sold at the date of the judgment in the action mentioned below, and Mrs. Pearson was still alive.

Frederick Thomas Pearson, one of the four children of Mrs. Pearson, in addition to his own one-fourth share under the settlement, was entitled under the will of a sister who died

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in November, 1896, to one equal third part of her one-fourth share.

Edwin Stapley died in 1878, and in 1892 the trustees of the settlement were Henry Stapley, Stephen Steele, and F. T. Pearson.

Henry Stapley having died, G. A. Flowers was appointed trustee in his place by deed dated April 1, 1896. Steele died after the action was commenced.

On September 27, 1892, F. T. Pearson mortgaged his reversionary one-fourth of the property to the Capital and Counties Bank, Limited, for 800*l*. Notice of this mortgage was given to the trustees through their solicitor, Flowers. It was admitted that Lloyd's Bank, Limited, which paid off this mortgage, was entitled to rank as first mortgagee in respect thereof.

By a deed dated November 22, 1892, which was wholly in the handwriting of F. T. Pearson, who was a solicitor, he mortgaged his reversionary one-fourth share to John Grinyer for 500*l*., subject to the admitted first mortgage of 800*l*. This deed was retained by F. T. Pearson in his own possession for several years.

By another deed, dated June 29, 1893, also in F. T. Pearson's handwriting, he charged his reversionary one-fourth in favour of Grinyer with a further sum of 500*l*. This deed was also retained by Pearson for several years. No notice of either of these two charges in favour of Grinyer was given to Flowers as solicitor to the trustees, and there was no proof that any notice was given to either H. Stapley or Steele, they being then with Pearson the three trustees.

In August, 1894, F. T. Pearson executed a mortgage in favour of Mackenzie & Hart, subject only to the bank's first mortgage of 800*l*. This deed contained a remarkable provision that no notice should be given either to the bank or to the trustees until the reversion fell into possession, unless default was made. F. T. Pearson at the same time made a statutory declaration that he had never mortgaged, charged, or otherwise incumbered his part or share except by the bank mortgage for 800*l*. This mortgage had been paid off before action.

In May, 1898, Pearson mortgaged all his interest, which included his original one-fourth and his proportion of his deceased sister's share, to Lloyd's Bank, Limited, to secure his current account up to 1800*l*. Notice of this charge was given to Flowers, who was then one of the trustees and acted as solicitor for them. Inquiry was made by Lloyd's Bank as to the existence of any incumbrances other than the 800*l*. mortgage. In fact, the bank had no notice or knowledge of either of the charges held by Grinyer.

In January, 1900, the present action was brought against F. T. Pearson and Grinyer by Lloyd's Bank, which claimed (1.) a declaration that it was entitled to be paid out of the share or interest of F. T. Pearson in the moneys to arise from the sale of the freehold property in priority to the alleged incumbrances of Grinyer; (2.) to have an account taken of what was due on the bank's mortgage, and that it might be enforced by foreclosure or sale; (3.) costs.

Pearson had been adjudicated a bankrupt and had absconded and against him and his trustee in bankruptcy the action proceeded in default. The Court held that it was Pearson's fraud which involved loss to either the bank or Grinyer, and found as a fact that no notice of the charges in favour of Grinyer was given to either H. Stapley or Steele.

The action was tried, with witnesses, before Cozens-Hardy J. on February 22, 23, and 25, 1901.

Eve, *K.C.*, and *Curtis Price*, for the plaintiff bank. In the first place, the property mortgaged having been constructively converted into personal property by reason of the trust for sale, the rule in *Dearle* v. *Hall* (1), that the mortgagee who gives notice obtains priority over the mortgagee who has not given notice, although the latter's mortgage is earlier in point of date, applies: *Foster* v. *Cockerell* (2); *In re Wyatt* (3); *Lee* v. *Howlett*. (4)

Secondly, notice to one of several trustees is not necessarily

(1) 3 Russ. 1; 27 R. R. 1.
(2) (1835) 3 Cl. & F. 456; 39 R. R. 24.
(3) [1892] 1 Ch. 188, 195; on appeal *Ward* v. *Duncombe*, [1893] A. C. 369.
(4) (1856) 2 K. & J. 531.

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notice to all of them. Any presumption that the trustee who has notice will communicate his knowledge to his co-trustees may be rebutted, and the fact that he is himself the person creating the incumbrance is of itself sufficient to rebut the presumption. In such a case the notice which he acquires is as assignor, and does not give his assignees priority over subsequent incumbrancers who give notice: *Browne* v. *Savage* (1), approved by North J. in *Newman* v. *Newman* (2); and see *Low* v. *Bouverie*. (3)

The principle of *Browne* v. *Savage* (1) had been enunciated in previous cases in bankruptcy: *In re Hennessy* (4), the case of an agent of a life assurance company who had insured his own life, himself receiving notice of his assignment, and *Ex parte Boulton* (5), the case of a secretary of and shareholder in a company who had borrowed money on the deposit of his share certificates. In each case the absence of notice to the company was held to be fatal.

Browne v. *Savage* (1) has never been overruled, although it has perhaps been doubted: see *Willes* v. *Greenhill*. (6)

[They also referred to *Arden* v. *Arden*. (7)]

Micklem, K.C., and *E. P. Hewitt*, for the defendant Grinyer. The onus lies on the bank to prove affirmatively that the trustees had no notice of Grinyer's charges, and they have not discharged that onus: *Ward* v. *Duncombe* (8); *Ex parte Stevens*. (9)

The rule in bankruptcy was that, where the incumbrancer was one of several trustees of a fund, the notice which he had of his own charge was sufficient to take the fund out of the order and disposition of the trustees: *Ex parte Rogers*. (10) And notice to one of three trustees, not being the assignor, had the same effect: *Smith* v. *Smith*. (11) And it is in other cases sufficient if such a notice has been given as would be enough

(1) 4 Drew. 635.
(2) (1885) 28 Ch. D. 674.
(3) [1891] 3 Ch. 82.
(4) (1842) 2 D. & War. 555, 563.
(5) (1857) 1 De G. & J. 163.
(6) (1860) 29 Beav. 376, 387; on appeal (1861) 4 D. F. & J. 147.
(7) (1885) 29 Ch. D. 702.
(8) [1893] A. C. 369.
(9) (1834) 4 Dea. & Ch. 117.
(10) (1856) 8 D. M. & G. 271.
(11) (1833) 2 Cr. & M. 231; 39 R. R. 762.

to take the case out of the order and disposition of the trustees: *Lloyd* v. *Banks*. (1)

[COZENS-HARDY J. referred to Robson on Bankruptcy, 7th ed. p. 534, *Saffron Walden Second Benefit Building Society* v. *Rayner* (2), and *Mutual Life Assurance Society* v. *Langley*. (3)]

Browne v. *Savage* (4) stands alone, and is inconsistent with *Willes* v. *Greenhill* (5), especially with the prepared but undelivered judgment of Knight-Bruce L.J. in that case. (6)

[COZENS-HARDY J. referred to *Shropshire Union Railways and Canal Co.* v. *Reg.* (7)]

The principle of *Dearle* v. *Hall* (8) is not to be extended: *Ward* v. *Duncombe* (9); *In re Wasdale*. (10)

[They also referred to *Atterbury* v. *Wallis*. (11)]

Eve, K.C., in reply, referred to *Rice* v. *Rice* (12); *Thompson* v. *Speirs*. (13)

Cur. adv. vult.

March 6. COZENS-HARDY J., after stating the facts, continued:—Under these circumstances the question I have to decide is whether Grinyer's securities, which are prior in time, take precedence of the charge of the plaintiff bank.

Now, I think it is clear that this is a case to which the rule in *Dearle* v. *Hall* (8) applies, although the land has not yet been sold, and although the securities all purport to deal with land and not with money. It is contended by the defendant Grinyer, in the first place, that it rests upon the plaintiff to prove that no notice of Grinyer's charges was given to either Stapley or Steele, and that no such proof has been furnished, and in the next place, that, even if the Court is satisfied that no notice was given to either of them, the knowledge which the defendant Pearson himself had, he being one of the trustees, is sufficient to protect Grinyer.

Now, on the first point I have felt considerable difficulty.

(1) (1868) L. R. 3 Ch. 488.
(2) (1880) 14 Ch. D. 406.
(3) (1886) 32 Ch. D. 460.
(4) 4 Drew. 635.
(5) 29 Beav. 376, 387; on appeal 4 D. F. & J. 147.
(6) 4 D. F. & J. 148, n.
(7) (1875) L. R. 7 H. L. 496.
(8) 3 Russ. 1; 27 R. R. 1.
(9) [1893] A. C. 369, 391.
(10) [1899] 1 Ch. 163.
(11) (1856) 8 D. M. & G. 454.
(12) (1853) 2 Drew. 73.
(13) (1845) 13 Sim. 469.

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Stapley and Steele are both dead, and Pearson has absconded. But upon the whole I have arrived at the conclusion that there is sufficient evidence to justify me in finding that no notice was given to either Stapley or Steele. I have seen Mr. Flowers, who gave his evidence very well. He was the person to whom the defendant Pearson and the other beneficiaries were in the habit of giving all notices addressed to the trustees; a large bundle of these was produced. The defendant Pearson was not on friendly terms, indeed, scarcely on speaking terms, with either Mr. Stapley or Mr. Steele, and I am satisfied that it is in the last degree unlikely that any communication relating to the trust from the defendant Pearson to his co-trustees should have reached them in any other way than through the hands of Mr. Flowers. I think, further, that if any such notice had reached either of them through some other source, it would at once have been made known to Mr. Flowers. Moreover, the two charges in favour of the defendant Grinyer were not charges for money then and there advanced. They were rather covering securities given by the defendant Pearson for the aggregate amount of small sums from time to time borrowed from the defendant Grinyer, and they were kept by Pearson in his own custody. They contain certain erasures which, to say the least, throw some doubt upon the date of execution, and I think it extremely improbable that any notice should have been given. It is not right to assume that the defendant Pearson was fraudulent in November, 1892, and June, 1893, merely because he was fraudulent and perjured in August, 1894. Nevertheless, I cannot wholly disregard the statutory declaration made in August, 1894, which he would scarcely have ventured to make if at that time any notice of the defendant Grinyer's charges had reached his co-trustees.

Upon the whole, therefore, I think I must deal with the case on the assumption that the defendant Grinyer can only rely upon the knowledge which the defendant Pearson, one of the trustees, had of his own incumbrances. Is this sufficient? Now, the very point was decided by Kindersley V.-C. in 1859 in *Browne* v. *Savage* (1); but I am asked to hold that that decision is not well founded and is inconsistent with prior and

(1) 4 Drew. 635.

subsequent cases. It is necessary to read what Kindersley V.-C. said. He said (1): "In the case where the assignor is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of the prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the trustee, who is the proposed assignor, to conceal the prior assignment; and the other trustees know nothing about it. Such notice, therefore, would not effect the object for which notice to trustees is required; viz., the security of the party taking the assignment against prior assignments concealed from him by his assignor. And therefore I am of opinion that, though Mr. Savage, being one of the trustees, had notice (as of course he had) of the assignment he had made to the plaintiff, Hannah Browne, such notice was not sufficient to give her priority over a subsequent incumbrancer with notice."

I am not aware that the authority of *Browne* v. *Savage* (2), so far as it relates to the effect of notice to or knowledge of a trustee assignor, has ever been questioned. It was quoted with approval by Sir John Romilly in *Willes* v. *Greenhill*. (3) That case only decided that where a beneficiary, the wife of a trustee, mortgaged her separate estate by a deed to which the husband trustee was a party, the notice to or knowledge of the husband trustee was sufficient. It will be observed that the trustee was not, and could not be, the assignor of his wife's separate estate, though he may have been and probably was the person who got the benefit of the money advanced. On appeal (4) Lord Westbury expressly stated that he did not intend to overrule or throw doubt upon any former decision, including of course *Browne* v. *Savage*. (2) In the very important case in the House of Lords of *Ward* v. *Duncombe* (5), *Browne* v. *Savage* (2) is cited by counsel as establishing a recognised exception to the

(1) 4 Drew. 640.
(2) Ibid. 635.
(3) 29 Beav. 376, 387.
(4) 4 D. F. & J. 147.
(5) [1893] A. C. 369, 375.

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sufficiency of notice to a single trustee, but there is no mention of it in the elaborate judgments of Lord Herschell and Lord Macnaghten; certainly there is nothing in either of those judgments to impugn its authority.

But it has been strongly urged before me that the rule in *Dearle* v. *Hall* (1) rests upon and follows the principles of the Court of Bankruptcy in dealing with order and disposition, and that as it has been decided that the knowledge of one of the assignors, who was a trustee, was sufficient to take a chose in action out of the order and disposition of the assignors—*Ex parte Rogers* (2)—the same rule ought to apply as between several incumbrances, and that Kindersley V.-C. overlooked this. But I think there is a fallacy in this argument. I have the authority of the Court of Appeal that the two cases are not analogous. In *Saffron Walden Second Benefit Building Society* v. *Rayner* (3) James L.J. says: "No doubt there are cases in bankruptcy in which it was held that notice to a person acting as solicitor was sufficient to take a chose in action out of the order and disposition of the assignor. Whether I should have decided those cases originally as they were decided, I will not undertake to say, but it seems to me that the question what is sufficient notice to prevent a thing from being alleged to be in the order and disposition of an apparent owner with the consent of the true owner, stands upon a very different footing from the question what is sufficient notice as regards successive incumbrancers." And again, in *Mutual Life Assurance Society* v. *Langley* (4), Cotton L.J. says: "Order and disposition must be with the consent of the true owner, and it may very well be that sufficient has been done to shew that the true owner does not consent to the fund remaining as it is, although it would not be sufficient to shew that notice had been given to effectually secure or obtain priority." I have carefully read Lord Macnaghten's judgment in *Ward* v. *Duncombe* (5), which I accept as a guide, but I do not profess to be able to discover any definite principle upon which the rule in *Dearle* v. *Hall* (1) is founded. Nevertheless, it must

(1) 3 Russ. 1; 27 R. R. 1.
(2) 8 D. M. & G. 271.
(3) 14 Ch. D. 406, 409.
(4) 32 Ch. D. 460, 470.
(5) [1893] A. C. 369, 375.

now be recognised as a positive rule, though it is not one to be extended. But it would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Kindersley V.-C. It commends itself to my judgment. But whether it did so or not, I should consider it proper to follow the unchallenged decision of that most learned and accurate judge, and to leave the parties to apply to the Court of Appeal to overrule *Browne* v. *Savage*. (1)

The result is that I must hold the plaintiff bank entitled to priority over the defendant Grinyer; and the usual accounts in a foreclosure action must be taken on that footing. The plaintiffs will add their costs to their security.

Solicitors for plaintiff bank: *Venn & Woodcock, for T. A. Goodman, Brighton.*

Solicitors for defendant Grinyer: *Clarke & Calkin, for Howlett & Clarke, Brighton.*

F. E.

COUNTESS OF BELMORE *v.* KENT COUNTY COUNCIL.

[1900 B. 2493.]

Highway—Roadside Waste—Dedication—Presumption—Evidence.

Where there are uninclosed spaces by the sides of a metalled highway there is no invariable presumption that the highway extends to the fence on either side.

The nature of the district, the width and level of the margins, and the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication.

THE plaintiffs were the tenant for life and her occupying tenant of a farm adjoining a main road in the county of Kent. The defendants, the Kent County Council, were the road authority.

Between the boundary fence of the farm and the metalled

(1) 4 Drew. 635.

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part of the road was a strip the subject of this action. The plaintiffs asserted that the strip was part of the farm, subject to no right of way for the public. The defendants asserted that the strip was part of the highway. The defendants had recently placed hard core and done work on the strip for the purpose, as they alleged, of improving the highway. The plaintiffs alleged that the defendants' work was commenced for the purpose of using the strip as a depot for road material.

The plaintiffs claimed: (1.) A declaration that the strip was their property, free from any right of the public to use it as a highway. (2.) In any case a declaration that the defendants were not entitled to use it as a depot for road material. (3.) An injunction to restrain the defendants from trespass. (4.) and (5.) Damages and costs.

The facts proved appear in the judgment.

Eve, K.C., and *Wace*, for the plaintiffs. The evidence establishes that the defendants have done and are intending to do what they are not entitled to do even on a public highway as the road authority; they are doing what will obstruct complete access to the plaintiffs' land; on this ground alone the plaintiffs are entitled to an injunction.

But the land on which the defendants have placed the rubbish has never been dedicated to the public: it is part of the plaintiffs' land which they may legally inclose; whether the land not actually metalled and ordinarily used as a highway has ever been dedicated to the public is a pure question of fact; the facts in evidence here are consistent only with the property in question being private. There is really no presumption in favour of dedication: *Neeld* v. *Hendon Urban Council.* (1)

Vernon Smith, K.C., and *Church*, for the defendants. There is a presumption of law, at the least a primâ facie presumption, that highway dedicated to public use as a road extends from hedge to hedge: *Doe* v. *Pearsey* (2); *Elwood* v. *Bullock* (3); *Derby County Council* v. *Matlock Urban Council* (4); *Curtis* v. *Kesteven County Council.* (5) There is nothing in the

(1) (1899) 81 L. T. 405.
(2) (1827) 7 B. & C. 304; 31 R. R. 209.
(3) (1844) 6 Q. B. 383.
(4) [1896] A. C. 315.
(5) (1890) 45 Ch. D. 504.

evidence to rebut that presumption. The acts of the defendants complained of are a proper use of a highway by the road authority.

Eve, K.C., in reply.

March 18. COZENS-HARDY J. The question in this action is whether the public have any, and if so what, rights over an uninclosed strip of land adjacent to the metalled road leading from Sevenoaks to Otford. This road was not laid out under any Inclosure Act. It seems to be an ancient highway, which was kept in repair under a turnpike trust from the middle of last century until a few years ago, when the trust expired. It is now a main road under the control and management of the Kent County Council. The defendants have begun to deposit rubbish and to lay a drain along the strip, for the purpose of rendering it suitable for public use. The strip lies on the west side of the road. It is about 300 yards long, and about 50 feet wide at the broadest part, tapering off to nothing at each end. The strip is not part of the waste of the manor. The land adjoining the strip on the west is a farm, of which the plaintiff, the Countess of Belmore, is tenant for life in possession, the co-plaintiff Kipping being her tenant. The farmhouse and farm buildings lie a short distance to the west of the strip. Pawley, who occupied the farm from 1865 to 1870, constructed a cartway from the high road across the strip. This cartway was raised some 3 feet or 4 feet, and a drain was placed under it to carry off the water from the upper part into a ditch which was dug along the strip. In 1893 the plaintiff Kipping made another similar cartway to the north of Pawley's cartway. There is an old hedge between the fields and the strip. This hedge is at the top of a small bank. The land slopes down from the hedge eastwards and from the high road westwards, and, until Pawley's drain and ditch were made, the bottom of the strip was a very swampy place, and even now it is soft and wet except in summer weather. Willows and rough grass grow on the strip. These willows were from time to time cut and carried away by the tenants of the farm. The rough grass was occasionally cut by the tenants. There is no evidence that

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any vehicle ever went along the strip, and, indeed, within living memory this would not have been possible. Nor is there any evidence that any man on horseback ever went along it, except occasionally on the margin next the high road. There is no defined track or footpath on this margin, but occasionally foot-passengers walked on this margin instead of on the high road. This was not done frequently, but the margin was trodden by foot-passengers more often than by men on horseback. On the opposite, or eastern, side of the high road was a somewhat similar strip, which has recently been inclosed with the consent of the Kent County Council. There is now a formed footpath on the east side of the high road, and I gather that foot-passengers have at all times been in the habit of walking on the grass margin on the east side rather than on the west side, probably because the surface was more level and even on the east than on the west.

Thus far I have dealt with facts which are either admitted or not substantially controverted. But there are other facts in dispute, and upon these issues I must state my findings.

Thomas Fishenden, son of an old tenant of the farm, and who followed his father as tenant, speaks from 1848 till 1865. He gave his evidence in a manner which completely satisfied me. He swore that his father's cattle and his cattle used to be turned into the strip to graze, and that his father used to put hurdles all round the boggy places to keep the cattle from getting in, which hurdles were only taken away in the summer. I accept this evidence.

There is a good deal of evidence by other tenants or their labourers that horses and cattle from the farm used to be turned out to graze on the strip. There is no doubt that horses or cattle passing along the road sometimes strayed into or were turned into the strip. The principal person who did this was a cattle-dealer named Young, and he admitted that he had been ordered off by the tenants, who would not let the cattle stop.

It is clear that gipsies occasionally stopped there, but they were ordered off by the tenants, and not by the road authorities.

Mr. Morgan, who was road surveyor up to about 1878, seeing some cattle straying on the strip, ordered them off, saying that they had no right there without leave of the owner. On the other hand, some cows were occasionally taken there to graze by occupiers of land in the neighbourhood, though this was not proved to be with the knowledge of the tenants. Grass was occasionally cut by passing strangers and carried away in carts, but such acts were wrongful, whether the strip was or was not part of the highway.

The result of the evidence as a whole is that, as far as living memory goes, the plaintiffs or their predecessors in title have used and enjoyed this strip in such a manner and to such an extent as the nature of the strip permitted, and have exercised acts of ownership inconsistent with public rights. I refer especially to the hurdles, to the roadways, to the ditch, and, though I do not attach great importance to it, to the cutting of the willows. I do not find a single act done on the strip by the road authorities until the acts complained of in this action. I cannot regard the occasional placing of a heap of stones or road scrapings on the west side of the high road instead of on the east side, where they were usually placed, as of any real importance. There is a conflict of evidence as to the fact, but, assuming it to be proved that a heap of stones or scrapings was placed there for a short time, I should hesitate to regard it as an act which the occupier of the strip was bound to protest against. The proper inference would be that it was permissive. Upon the whole, I think the evidence is not sufficient for the purpose of proving dedication of the strip as a highway by user. There is not a single exercise of highway rights over the strip except at the narrow margin next the high road—a margin varying from 2 to 4 feet in width, and to some extent obstructed by shrubs.

The defendants, however, assert that there is a presumption of dedication to the public quite up to the ancient fence, and that there is no justification for limiting the dedication to that portion of the high road which is metalled, even though highway rights have not been exercised beyond the metalled roadway. On this point I have derived assistance from the

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judgments of Channell J. and of the Court of Appeal in *Neeld* v. *Hendon Urban Council*. (1) Lord Russell of Killowen says (2): "It seems to me very difficult to give assent to such a general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway. . . . It is often impossible to discover the exact circumstances under which a fence has been erected upon any particular spot. The fence may have been put there because there was already a sort of natural boundary, or it may be in some cases that the person who made the inclosure wished to leave a margin of ground for the use of the public if at any time the road should become foundrous. But even in the latter case I doubt whether it would be right to say that a margin left by the landowner outside a fence for that purpose is necessarily dedicated by him as a highway for all time." Now, applying the principles laid down by the late Lord Chief Justice, I think there is no presumption of dedication up to the old fence, or that, if there is any such presumption, it is rebutted by the surrounding circumstances and by the evidence. The only difficulty I have felt is as to the margin. But upon reflection I do not see my way to hold that it is part of the highway, unless every highway passing through an uninclosed country must, as matter of law, be deemed to include a certain space on each side of the metalled road. I am satisfied that the margin

(1) 81 L. T. 405. (2) 81 L. T. 409.

has been used only occasionally and by a few persons, and only to such an extent and in such a manner as was inevitable by reason of the absence of any fence or other obstacle. Such user is too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway. I may add that, even if the public have rights over the margin, but not beyond, the acts of the defendants cannot be justified. I must therefore make a declaration and grant an injunction in terms of paragraphs 1 and 3 of the claim, and the defendants must pay the costs of the action.

Solicitors: *Patersons, Snow, Bloxam & Kinder; Prior, Church & Adams.*

D. P.

In re WALKER. WALKER *v.* DUNCOMBE.

[1901 W. 222.]

Settled Estates—Infant Tenant in Tail—Maintenance—Direction to accumulate Surplus Income—Allowance for Up-keep of Family Mansion—Subscriptions to Local Charities.

A testator devised real estates upon trusts under which, in the events which happened, A. became infant tenant in tail in possession. The will directed that during the minority of any person for the time being tenant in tail in possession the trustees should apply 500*l.* per annum out of the income for the maintenance and education of the minor, and should accumulate the surplus income for the benefit of the minor on attaining twenty-one. The testator also bequeathed nearly half a million in money to be invested in real estate to be held upon the same trusts as the devised estates. The net income of the settled property exceeded 14,000*l.* per annum.

The Court sanctioned a scheme for allowing 4000*l.* per annum out of the income for the up-keep of the family mansion and the maintenance there of the infant tenant in tail in a manner befitting the social position he would occupy in life. This allowance included 100*l.* per annum for subscriptions to local charities.

THIS was an application to obtain the sanction of the Court to a scheme prepared by the trustees of a settlement for the maintenance of an infant, who was tenant in tail in possession of the settled estates, under these circumstances.

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Sir James Walker, Bart., late of Sand Hutton, in the county of York, by his will dated September 5, 1882, devised real estates of great value in the county of York and elsewhere (comprising 9698 acres) to the use of three persons, upon trust that they, or other the trustees or trustee for the time being of his will, should as soon as conveniently might be after his death settle and assure the said real estates to the uses upon and for the trusts, powers, and provisions thereinafter declared concerning the same, that was to say, to the use of his eldest son James Robert Walker for life without impeachment of waste, and after his decease to the use of James Heron Walker (the first son of the said James Robert Walker) for life without impeachment of waste, and after the decease of the said James Heron Walker to the use of the first and every other son of the said James Heron Walker severally and successively in tail male, with divers remainders over. And the testator (amongst other things) directed that the said settlement should contain provisions enabling the trustees or trustee for the time being thereof, during the minority of every person for the time being entitled thereunder, either as tenant for life or in tail by purchase to the possession of the said real estates, to manage the same and to receive the rents and profits thereof, and to make any new or additional buildings, fences, plantations, or other improvements thereon as the same trustees or trustee should think proper and most advantageous for the same estates and the persons interested therein, and to apply for such purposes accordingly any part of the rents and profits of the same hereditaments; and also provisions that the said trustees or trustee for the time being should out of the rents and profits of the same estates raise and levy, during the minority of any tenant for life or in tail by purchase in possession as aforesaid, such yearly or other sum for the maintenance, education, or benefit of such minor as his guardian or guardians should in writing direct (not exceeding in the whole, until such minor should attain the age of eighteen years, the sum of 500*l.* in any one year, and for the residue of such minority the sum of 600*l.* in any one year), and should pay the same yearly, or other sum or sums of money, to such guardian or guardians, to

be applied to the last-mentioned purposes, either immediately by them or at their election, to be paid to any person or persons to be appointed by them to receive and apply the same to those purposes; and also that the said trustees or trustee for the time being should, during the minority of any tenant for life or in tail by purchase in possession as aforesaid, invest and accumulate on such securities as were thereinafter authorized the surplus of the yearly rents and profits of the settled estates for the benefit of such tenant for life, or in tail as aforesaid, if he should attain full age, but if he should die under age, then should hold all investments and accumulations of surplus rent during his minority upon the trusts therein directed to be declared concerning the moneys to arise from any sale or exchange of the said settled estates under the said settlement; and the testator directed that the said settlement should contain usual powers of leasing for twenty-one years, and of sale and exchange, and that the money to arise from any sale and exchange should be invested in the purchase of other hereditaments to be settled to the same uses and trusts as in the settlement to be contained. And the testator expressed his desire that the said James Robert Walker should make Sand Hutton his chief residence.

By a codicil to his said will the said testator bequeathed a sum of 340,000*l.* and the residue (about 100,000*l.*) of his personal estate to the trustees of his will, upon trust to invest the same and the interest thereof upon the same trusts and purposes as in the will declared concerning the moneys to arise under the powers of sale and exchange to be contained in the settlement.

The said testator died on October 8, 1883, and the settlement of the devised real estates directed by his said will was carried into effect by a deed dated August 19, 1884.

Sir James Robert Walker, the first tenant for life under the will and deed of settlement, died on June 12, 1899, and was succeeded as tenant for life by his son, Sir James Heron Walker, who died on November 25, 1900, leaving a widow, Dame Violet Maud Cecil Walker, and five infant children, the eldest of whom, Sir R. J. M. Walker (who was born in March,

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1890), then became tenant in tail in possession under the will and deed of settlement of the real estates and settled funds.

This was an originating summons by the infant tenant in tail, suing by his next friend, for an order—(1.) That the defendant trustees might be authorized to permit Sand Hutton Hall, together with the outbuildings, gardens, and pleasure grounds, to be used and occupied during the minority of the plaintiff as the residence of the plaintiff and of Dame Violet Maud Cecil Walker, the mother and one of the guardians of the person of the plaintiff. (2.) That the defendant trustees might be authorized during the minority of the plaintiff, out of the rents, profits, and income of the estate of which the plaintiff under the said will and settlement is tenant in tail in possession, to keep Sand Hutton Hall and the outbuildings thereof, including the greenhouses and all other garden buildings, erections, and walls, in repair, so far as regards roofs, main walls, and timber and external repairs, and to pay 4000*l.* per annum (free of income tax) for the maintenance and education of the plaintiff as from January 1, 1901, to the said Dame Violet Maud Cecil Walker, one of the guardians of the person of the plaintiff.

It appeared from the evidence that Sand Hutton Hall was the principal mansion-house on the estates, and had been occupied and maintained by Sir James Walker, Sir James Robert Walker, and Sir James Heron Walker as the family seat. It was rebuilt some years ago by Sir James Robert Walker at a cost of 20,000*l.* It comprised, with the outbuildings, gardens, and pleasure grounds, some seventeen acres, and required about 600*l.* per annum to maintain it in proper order. The rents and profits and income of the settled estates and settled funds amounted to some 24,000*l.* per annum, and, after providing for all annuities, jointures, and other charges and outgoings, the net income of which the infant plaintiff was tenant in tail in possession exceeded 14,000*l.* per annum. It was most desirable in the interest, and it would be greatly for the benefit, of the infant plaintiff that he should be brought up as far as possible at Sand Hutton Hall, and that Sand Hutton Hall should continue to be maintained and kept up as the

principal mansion-house of the estate, where the plaintiff could reside as his permanent home with his mother and her other children. With this object the trustees had prepared the following scheme for 4000*l.* per annum to be paid to the guardians of the plaintiff, as an allowance for his maintenance and education:—

	£	*s.*	*d.*
Internal repairs of Sand Hutton Hall and the outbuildings attached thereto . .	200	0	0
Maintenance of gardens and pleasure grounds of Sand Hutton Hall	600	0	0
To be paid to Dame V. M. C. Walker for the maintenance of the plaintiff . .	2700	0	0
Tutors, clothing, pocket-money, travelling and incidental expenses of plaintiff . .	400	0	0
Subscriptions to local charities . . .	100	0	0
	£4000	0	0

Sand Hutton Hall could be maintained by Dame V. M. C. Walker if the foregoing allowance were authorized by the Court; but otherwise the house would have to be let, if a tenant could be found, and the plaintiff would have to be brought up and maintained elsewhere. Dame V. M. C. Walker had a separate annual income of her own of about 2500*l.*, and would also receive the income (about 1000*l.*) of the portions of her younger children for their maintenance, but she could not properly maintain the plaintiff at Sand Hutton Hall and educate him on a smaller allowance than that above stated.

Butcher, K.C., and *T. L. Wilkinson*, for the infant plaintiff. It is considered by the members of the family to be for the plaintiff's benefit that he should be allowed to live at Sand Hutton Hall to become acquainted with and known to his tenantry, and be identified with all the old associations that count for so much in such a family. But 500*l.* per annum is wholly inadequate for the purpose. It is submitted that the case falls

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within the principle of *Griggs* v. *Gibson* (1); *Havelock* v. *Havelock* (2); *In re Collins* (3); *Bennett* v. *Wyndham* (4); *Revel* v. *Watkinson* (5); *Greenwell* v. *Greenwell* (6); *Barnes* v. *Ross*. (7) The guardians approve of the scheme. Under the circumstances the allowance of 100*l*. per annum for subscriptions to local charities is reasonable. Sect. 43 of the Conveyancing and Law of Property Act, 1881, also seems applicable to the case.

T. B. Napier, for the defendant trustees.

Davenport, for the infant remaindermen. It is not to the benefit of the infant remaindermen to contest this application. A liberal allowance for keeping up Sand Hutton Hall as the family residence is desirable; but the question is whether the Court can do it in the face of the express direction in the will to accumulate the surplus income.

FARWELL J. The testator, Sir James Walker, who died in 1883, was the great-grandfather of the present plaintiff, who is infant tenant in tail in possession under the limitations contained in the will. This is an application asking that the trustees may be permitted to expend some 4000*l*. a year in keeping up Sand Hutton Hall, the principal mansion-house on the property, and in paying the mother of the infant plaintiff a sum of money to enable an establishment to be kept up at Sand Hutton Hall where the infant tenant in tail, who is now ten years old, and his three brothers may reside. The estate is a very large one: about 12,000*l*. a year in land, and some half a million in personalty, which is given by a codicil to be invested in the purchase of land to be settled to uses similar to those devised by the will. I should have mentioned that the will directs a settlement to be made, but inasmuch as it sets out very fully the provisions which are to be contained in the settlement, and the settlement which has been made is practically a copy of the provisions in the will, I will deal only

(1) (1866) 14 W. R. 538.
(2) (1881) 17 Ch. D. 807.
(3) (1886) 32 Ch. D. 229.
(4) (1857) 23 Beav. 521.
(5) (1748) 1 Ves. Sen. 93.
(6) (1800) 5 Ves. 194.
(7) [1896] A. C. 625.

with the words contained in the will. [His Lordship then read the trustees' powers of management, and the maintenance and accumulation clauses above stated, and continued:—]

It is obvious that 500*l.* a year is wholly inadequate to keep up Sand Hutton Hall. There is a general power of leasing in the will which does not exclude the mansion-house, but there is an expression of desire that the son would reside at Sand Hutton Hall, which is some evidence to shew that the testator regarded Sand Hutton as the family mansion-house. The question that I have to consider is whether I can on the true construction of this will authorize the trustees to make any expenditure larger than the sum mentioned in the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible. But in considering what is the true construction of the will, it is open to the Court to ascertain if there be a paramount intention expressed in the will, and if so, to consider whether particular directions are properly to be read as subordinate to such paramount intention, or are to be treated as independent positive provisions. This is, in my opinion, the basis of the cases before Lord Hardwicke and Pearson J. *Revel* v. *Watkinson* (1) was a very strong case. Lord Hardwicke there had a tenant for life and a remainderman. There were charges upon the estates the interest on which more than absorbed the whole of the income of the property, and, in the absence of any express direction in the will, the tenant for life was bound to keep down the interest on the charges. But Lord Hardwicke held that there was in that case a paramount intention that the tenant for life should not starve, and he accordingly directed a reasonable sum to be paid for the maintenance of the tenant for life out of the income. That was extended by Pearson J., in the case of *In re Collins* (2), to the education and bringing up of an infant in a way suitable to the position which he was likely to fill in the world afterwards, on the ground that where a testator settles his property on persons in succession, but postpones the enjoyment of the estate and provides for infants being maintained,

(1) 1 Ves. Sen. 93. (2) 32 Ch. D. 229.

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he does not, by mentioning a sum for maintenance and directing an accumulation of the rest without negative words, necessarily forbid the expenditure of a larger sum, if it be proved to be necessary for the maintenance of the estate and the bringing up of the infants in a manner suitable to the position which he has pointed out for them by his will. There are in fact two intentions running side by side in this will. One is that the infant is to inherit the full enjoyment at twenty-one of that which is now subject to the management clauses. The other is that he shall have an allowance of 500*l.* a year during minority. I think I do no violence to the words of this will when I regard the 500*l.* a year as the sort of allowance which a parent in the position of the testator would make to a son who is under age, either allowing it to him personally or regarding it as the amount which would be necessary to pay his school bills and clothing and so on, while the parent himself provides a home and keeps up the family estate and the family mansion at which the boy lives with his father. The direction as to management in this will to my mind points to the same state of things. The testator certainly did not contemplate that Sand Hutton Hall should be shut up; and although the power of leasing is wide enough to include the letting of Sand Hutton in case it became necessary, I think the testator had no contemplation of the possibility of letting, nor would it be desirable or convenient that the house should be let as a furnished house unless it was unavoidable. I find in this will a paramount intention that the estate should be kept up, but no express provision made with respect to the mansion-house: I find an allowance of 500*l.* a year for the maintenance, education, or benefit of the infant tenant in tail: and I find no negative words forbidding the trustees to exercise their discretionary power of managing the estate by keeping up the family mansion-house as a home for the benefit of the infant tenant in tail and his family. I therefore hold that on the true construction of this will I can accede to the suggestion which is made to me. The case of *Griggs* v. *Gibson* (1), before Lord Hatherley, is strongly in favour of the conclusion at

(1) 14 W. R. 538.

which I have arrived. No question is here raised by Mr. Davenport that the amount is more than sufficient, and it seems to me to be a very fair and proper amount. And as regards one item—the subscriptions to charities—to which my attention has been specially called, although I am not aware of any reported case, it is within my own recollection that in many cases of large estates judges have allowed a sum to be expended for charities on the footing, amongst other things, that it is within the principle that the son is to be brought up and the property maintained in the mode usual amongst gentlemen holding the position to which the son is born, keeping up the reputation of the family and estate, and this involves the payment of subscriptions to local charities. Therefore I will make the order as asked.

Solicitors for all parties: *Long & Gardiner.*

H. L. F.

Dictum of FARWELL, J., at p. 891, *applied. Re* WESTBY'S SETTLEMENT. [1950] 1 All E.R. 479.

Applied. Re WESTBY'S SETTLEMENT [1950] 1 Ch. 296

In re GREENWOOD. SUTCLIFFE *v.* GLEDHILL.

[1901 G. 11.]

Will—Forfeiture Clause—Gift of Income to A. for Life or until Alienation—Garnishee Order—Rules of Supreme Court, 1883, *Order* XLV., *r.* 2.

By will personalty was bequeathed in trust to pay the income to A. for life "or until he attempts to alien, charge or anticipate the same . . . . or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," and then over. A judgment creditor of A. served the trustees, who had accrued income in their hands, with a garnishee order:—

Held, that the garnishee order did not operate as a forfeiture of A.'s life interest.

Bates v. *Bates*, W. N. (1884) 129, dissented from.

Sutton, Carden & Co. v. *Goodrich*, (1899) 80 L. T. 765, followed.

MARY GREENWOOD, widow, by her will dated November 4, 1891, after appointing the plaintiffs to be the executors and trustees thereof, devised and bequeathed to the plaintiffs all her real and personal estate upon trusts for sale and conversion,

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and to invest the net proceeds of such sale and conversion in manner therein mentioned, and to stand possessed of the said investments and the income thereof upon trust "if my son" (the defendant) "John Arthur Greenwood shall not at the time of my death be an undischarged bankrupt or shall not have executed, done or suffered any act, deed, or thing, or if no event shall have happened whereby the trust hereinafter declared would, if subsisting, be determined, then to pay the said income to my said son John Arthur Greenwood during his life, or until he attempts to alien, charge or anticipate the same, or any part thereof, or is adjudged a bankrupt, or takes proceedings for liquidation in bankruptcy, or makes any arrangement or composition with his creditors having the effect of a charge upon or alienation of the said income or any part thereof, or until he does or attempts to do or suffer any other act or thing, or until any other event happens whereby, if the same income were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," with a gift over on the happening of any of the said events.

By a deed dated March 30, 1893, part of the income of certain investments therein mentioned was, subject to the life interest therein of the said testatrix, settled upon trusts for the defendant John Arthur Greenwood for life upon terms similar to those contained in the will above stated.

In May, 1895, Mary Greenwood, the testatrix, died.

By another deed dated February 20, 1896, the income of certain investments therein mentioned was settled upon trusts for the defendant John Arthur Greenwood for life upon terms similar to those contained in the will above stated.

In January, 1899, one Williams, a judgment creditor of the defendant John Arthur Greenwood, served the plaintiffs, as trustees of the will, with a garnishee order nisi, afterwards made absolute; and under this order the plaintiffs paid Williams his judgment debt and costs out of the accrued income then in their hands and payable to the defendant John Arthur Greenwood.

In November, 1900, the defendant Gledhill, a judgment

creditor of the defendant John Arthur Greenwood, served the trustees of the will and of the settlements with a garnishee order nisi in respect of his judgment debt of 681*l.* 14*s.* 2*d.* and costs; and on his application for an order absolute it was ordered that the application should stand over to enable the trustees of the will and of the settlements to take the necessary steps in the Chancery Division to ascertain the rights and interests of the parties claiming to be entitled to the trust funds subject to the trusts of the will and settlements.

At the date of the service of the defendant Gledhill's garnishee order nisi, the trustees of the will and of the settlements had in their hands accrued income under the will and settlements payable to the defendant John Arthur Greenwood.

This was an originating summons asking whether, in the events which had happened, a forfeiture of the life interest of the defendant John Arthur Greenwood under the will and settlements had taken place, and, if so, from what date.

P. S. Stokes, for the plaintiffs, the trustees of the will, and for the plaintiff N. H. Sutcliffe, who was also one of the trustees of the settlements.

Upjohn, K.C., and *E. Ford*, for the defendant, S. F. Sutcliffe, who was the other trustee of the settlements, and also a beneficiary under the will and the settlement of March, 1893. It is submitted that the life interest has been forfeited. The service of a garnishee order nisi created a charge on the accrued income in the hands of the trustees, and prevented John Arthur Greenwood from receiving it: Order XLV., r. 2; *Hamer* v. *Giles* (1); *In re Combined Weighing and Advertising Machine Co.* (2)

[FARWELL J. referred to *Rogers* v. *Whiteley*. (3)]

That case is conclusive that there is no right to receive the income after the service of the order nisi. The exact point which arises here was decided in *Bates* v. *Bates* (4), where Pearson J., on similar words, held that a garnishee order caused a forfeiture; and in the case of *In re Sartoris' Estate* (5) it was

(1) (1879) 11 Ch. D. 942.
(2) (1889) 43 Ch. D. 99.
(3) [1892] A. C. 118.
(4) W. N. (1884) 129.
(5) [1892] 1 Ch. 11.

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held, on very similar words, that a receiving order created a forfeiture.

Loehnis, for the defendant Gledhill. There has been no forfeiture. The garnishee order cannot attach future income; it only operates on moneys in the hands of the trustees: *Webb* v. *Stenton*. (1) The date to be regarded is the moment when the income accrues due and is in the hands of the trustees: *In re Sampson*. (2) Here John Arthur Greenwood at the moment when the income was payable to him had not deprived himself of the right to receive it. *Bates* v. *Bates* (3) was discussed in *Sutton, Carden & Co.* v. *Goodrich* (4), and not followed.

MacSwinney, for the defendant John Arthur Greenwood, supported the argument of the judgment creditor, and cited *In re Stulz's Trusts*. (5)

Upjohn, K.C., in reply. In *Sutton, Carden & Co.* v. *Goodrich* (4) and *In re Sampson* (2) the words were very different from those in the present case. *In re Stulz's Trusts* (5) was also decided on the particular words in the will.

FARWELL J. In this case I come to the conclusion that the garnishee order absolute does not operate as a forfeiture. J. A. Greenwood is entitled under a trust in a will, and under a trust in settlements in similar terms, to a life interest in these words: [His Lordship read the clause in the will above stated, and continued:—]

Now what has happened is this. A creditor has obtained first an order nisi, and then absolute, garnishing the income accrued due under the trust and then actually in the hands of the trustees. Now it is plain from the decisions on the rules that a creditor can only garnish a debt after it has become due. Lindley L.J. in *Webb* v. *Stenton* (6) says: "But is a trustee a debtor to his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust; then of course he is a debtor and there is no difficulty in attaching such a debt under this order. But take the case of a trustee of Consols for me for my

(1) (1883) 11 Q. B. D. 518.
(2) [1896] 1 Ch. 630.
(3) W. N. (1884) 129.
(4) 80 L. T. 765.
(5) (1853) 4 D. M. & G. 404.
(6) 11 Q. B. D. 526.

life. Is he in any proper sense my debtor so long as he has no dividends which are payable to me? Clearly not, he individually may never receive those dividends; there may be a change of trustees before the next dividend day. You cannot possibly say that a trustee is a debtor to the cestui que trust before he has, or but for some fault of his might have had, the money which it is his duty to hand over."

A garnishee order, therefore, proceeds on the footing that a trustee is not only a trustee, but also by operation of the true construction of the will and the rules of law and equity a debtor as well. It is by virtue, not of a continuing trusteeship, but of the new relation of debtor and creditor that a garnishee order can be obtained at all. That being so, the applicants are in this dilemma: either the order is ineffectual, because there is no debt at all and therefore it is merely invalid; or it is effectual, because there is a debt, and a debt arising as between the trustee and the tenant for life, which shews that the income has actually become payable in such a way as to constitute a debt. In my opinion, this latter is the true view on this will. First of all, we must bear in mind that the Courts do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present. In my opinion, the true meaning of these words—and they are the only words really material to the present case—"or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," is "if he were deprived of the right to receive the same or any part thereof on the day it becomes due." That seems to me not only a fair and reasonable construction of the words of this particular will, but also to be in accordance with what I think are really the necessary requirements of the law to make it a valid gift. I think Sir John Rolt's argument in the case of *In re Stulz's Trusts* (1) is well founded, namely, that you cannot

(1) 4 D. M. & G. 404.

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give a man the income of a fund during his life, payable on the quarterly or half-yearly days on which it becomes due, and then take it away from him by reason of any event that happens after the day when the money has become actually due. So to do would be repugnant to the absolute gift. Mr. Upjohn tried to avoid that by saying there is no absolute gift here. I do not agree with that. The first gift is to pay the income to J. A. Greenwood during his life. Then, according to the construction I put on this clause, the defeasance portion is limited to the period until each particular quarterly or half-yearly payment becomes actually payable. When once it becomes payable there is a trust to pay, and the day after the cestui que trust's dividend has become payable the trustee is turned into a debtor as well as a trustee, and is bound to pay under the trusts of this will to J. A. Greenwood. That being so, it is not competent to the testator to attempt to deprive J. A. Greenwood after the date at which he is so entitled to give a receipt, of the income by reason of any matter subsequent to the day on which he was entitled to give a discharge for it. That seems to me to be the true view to take of the construction of this will. And this is to some extent confirmed by the decision of Kennedy J. in *Sutton, Carden & Co.* v. *Goodrich* (1), and still more by the decision of Stirling J. in the case of *In re Sampson* (2), where he puts the proposition I adopt on this will in a way which is equally applicable to this case. He says: "I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will." Any other construction would lead to startling results. For example, the cestui que trust might go to his trustee the day after the income was received, receive his money, and then go round and pay his bills; but if he were ill in bed, he could not send a request to his trustee to be good enough to go round and pay the bills for him, and at the same time write to his creditors and say, "I am ill; do not trouble me; my trustee is coming round

(1) 80 L. T. 765. (2) [1896] 1 Ch. 630, 636.

to pay you with the income which is already mine." That would be a conclusion I should be very reluctant to arrive at unless I was actually driven to it. But on the cases which have been cited I do not think I am driven to it. The decision which has caused me the most doubt is the case of *Bates* v. *Bates*. (1) I cannot avoid the conclusion that I am not following that case, because I think the result of the view I take is that you cannot create a forfeiture by a garnishee order, inasmuch as you can only garnish what is a debt actually due. But in *Bates* v. *Bates* (1) Pearson J. undoubtedly held that a garnishee order did operate as a forfeiture. I can only say, with every respect for that very eminent judge, that no reasons are given for his decision, and I am really unable to follow it. It has already not been followed by Kennedy J. in *Sutton, Carden & Co.* v. *Goodrich* (2), and I do not think it is consistent with *In re Stulz's Trusts* (3), a decision of the Court of Appeal. I quite follow what Mr. Upjohn said in reply, that the words in that case and in *Sutton, Carden & Co.* v. *Goodrich* (2) were different, but I do not agree with him that they are all governed by the word "anticipate." I do not think the decision turned on that except so far as it gave rise to the argument of Sir John Rolt, which I think is a sound argument.

Solicitors for plaintiffs: *Ridsdale & Son, for Sutcliffe & Co., Hebden Bridge.*

Solicitors for defendants: *W. J. & E. H. Tremellen, for Eastwoods & Sutcliffes, Todmorden.*

(1) W. N. (1884) 129. (2) 80 L. T. 765.
(3) 4 D. M. & G. 404.

H. L. F.

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Feb. 28; *March* 1.

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[1900 S. 2394.]

STEVENS *v.* CLARK.

[1900 S. 2393.]

Market—Statutory Market—Disturbance—Statutory Remedy—Injunction—Jurisdiction—Practice—Proceeding in Lieu of Demurrer—Right to begin—Rules of Supreme Court, 1883, *Order xxv., r.* 2.

Where a statute provides a particular remedy for the infringement of a right of property thereby created or re-enacted, the jurisdiction of the High Court to protect that right by injunction is not excluded, unless the statute expressly so provides.

On a proceeding in lieu of demurrer under Order xxv., r. 2, the party who by his pleading raises the point of law has the right to begin.

POINT OF LAW.

These were actions by the lessee of the Sidmouth Market and tolls asking for a declaration that the defendants were not entitled to hawk, sell, or offer, or expose, or carry for sale within the parish of Sidmouth any commodities usually sold in public markets except in accordance with the provisions of the Sidmouth Market Acts, 1839 and 1846, and after payment of the tolls payable thereunder, and for an injunction, an account of tolls due, and damages.

By the Sidmouth Market Act, 1839 (2 & 3 Vict. c. lxxxi.), intituled "An Act for maintaining and regulating the market in the parish of Sidmouth, in the county of Devon," after reciting that a market for the sale (inter alia) of vegetables and other commodities had been long held within the parish of Sidmouth, and that E. H. B. Hughes claimed to be the lord of the manor of Sidmouth with the rights, members, and appurtenances thereof, and to be entitled to certain customs, tolls, and duties of and arising from the markets held within the same parish, and that the said E. H. B. Hughes purposed to erect at his own expense a commodious market-house in the said parish, or to improve the present market-house there, and that it would be of great advantage to the inhabitants of the

said parish and the neighbourhood thereof and to the frequenters of the said market, if the same were put upon a permanent footing with proper regulations and rules for conducting and managing the same, it was enacted as follows—namely :—

Sect. 1: That it should be lawful for the said E. H. B. Hughes, or the owner of the said market for the time being, at his own costs, charges, and expenses, to take down the buildings and the present market-house, or any future market-house to be erected by him, and at his own proper costs and charges from time to time to erect thereon or on the sites thereof, or on such other grounds belonging to the said E. H. B. Hughes, or the owner for the time being of the said market, as he might think proper, a market-house in lieu of the present market buildings, or to cause the same to be improved and made more convenient; and when and so soon as such new or improved market-house should have been built and opened, the market and building so to be erected and the market-place so to be provided should be the only place within which the market for the sale (inter alia) of vegetables or any other commodities usually sold in public markets should for the future be held; and it should not be lawful for any person to erect or hold any other market within the parish of Sidmouth, or to sell, or offer, or expose to sale (inter alia) any vegetables or any other commodities usually sold in public markets, in any other place whatsoever, except in such new or improved market, except as authorized or excepted by this Act; and if any person should sell or expose to sale (inter alia) any vegetables or any other commodities usually sold in public markets, in any shop, building, or place, or in any of the streets, lanes, entries, or other public passages or places other than that appointed by the lord of the manor as aforesaid, or the owner of the said market for the time being (except as thereinafter authorized or excepted), every such person should, on conviction before any justice of the peace for the county of Devon, for every such offence, forfeit and pay any sum not exceeding 5*l.*, which penalty should be paid and payable to the lord of the said manor, or the owner of the said market for the time being.

Sect. 2: That nothing therein contained should extend to

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prevent any inhabitant householders from selling or exposing to sale any marketable commodities in their own private dwelling-houses or shops or premises used and occupied therewith by such inhabitant householders in any part of the parish of Sidmouth, and any marketable commodities might be sold in hand-baskets or other things carried by any person within the parish of Sidmouth on payment of the tolls specified in the schedule to this Act annexed, and the same commodities might be sold in carts, panniers, or other things drawn or carried by a horse or other animal at any place beyond half a mile by the nearest usual road from the market-place, on the owners of such carts, &c., paying the tolls specified in that behalf in the said schedule.

Sect. 4: That there should be paid to the lord of the manor, or the owner for the time being of the said market, by all persons holding, using, or occupying any building or other convenience, standing-place, or station for selling or offering or exposing to sale any commodities as aforesaid in the said market-place or within the parish of Sidmouth (except as therein authorized or excepted), the several tolls not exceeding the respective sums mentioned in the schedule to this Act.

Sect. 5: That a list of tolls should be affixed upon conspicuous places in the said market-place.

Sect. 6: That if any person holding, using, or occupying any of such buildings or other conveniences, standing-places, or stations as aforesaid, or selling, or offering, or exposing to sale any goods or commodities in the said market-place or within the said parish of Sidmouth, should, upon demand thereof made by the agent authorized to receive the tolls, neglect or refuse to pay or evade the payment of the same, it should be lawful for the agent to levy the same by distress and sale of the goods so exposed to sale, or otherwise to summon the party so neglecting, refusing, or evading such payment before some justice of the peace for the county of Devon who was thereby authorized and directed to hear and determine such case in a summary way, and to order and enforce such payment, in like manner as he was thereby authorized to do in the case of any penalties or forfeitures by this Act imposed.

Sect. 8: That it should be lawful for the lord of the manor, or the owner of the said market, to let the said market-place and tolls to any person willing to take and farm the same.

Sect. 10: That in case any dispute should arise concerning such distress or sale for recovery of tolls, such dispute should be settled and determined by any justice of the peace having jurisdiction within the limits of this Act, who should by warrant under his hand and seal summon the parties to appear before him and hear and determine the matter, and make such order therein and award such costs to either party as to him should appear reasonable, and by warrant under his hand and seal cause the money to be awarded and the costs of such warrant to be levied by distress and sale of the goods of the party liable to pay the same.

Sect. 20: That all fines, penalties, and forfeitures imposed by this Act, the manner of levying and recovering whereof was not therein otherwise particularly directed, might in case of non-payment be recovered in a summary way by the order and adjudication of some justice of the peace for the county of Devon, and afterwards be levied by distress and sale of the goods of the person liable to pay the same by warrant under the hand and seal of such justice, who was thereby authorized and required to hear and determine the matter; but if upon the return of any such warrant it should appear that no sufficient distress could be had whereupon to levy the said fines, penalties, or forfeitures, and the same should not be forthwith paid, or in case it should appear to the satisfaction of such justice, upon the confession of the offender or otherwise, that he had not sufficient goods whereupon such fines, &c., could be levied if a warrant of distress should be issued, such justice should not be required to issue such warrant of distress, but might by warrant under his hand and seal commit such offender to gaol for any time not exceeding three calendar months, or until such fine, &c., should be paid and satisfied.

Sect. 28: That if any person should find himself aggrieved by any determination or judgment made or given in pursuance of this Act, it should be lawful for such person to appeal to

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quarter sessions, which Court was thereby authorized to hear and finally determine the matter.

Sect. 29: That no proceeding to be had touching the conviction of any offender against this Act, or any order made, or any other matter or thing done or transacted in or relative to the execution of this Act should be vacated or quashed for want of form, or be removed or removable by certiorari or any other writ or process into any of Her Majesty's courts of record at Westminster; any law, statute, or usage to the contrary in anywise notwithstanding.

Sect. 31: That nothing in this Act contained should extend to prejudice, hinder, abridge, make void, destroy, lessen, or defeat any right, interest, title, property, power, privilege, franchise, emolument, or authority of the lord of the manor of Sidmouth aforesaid (except as far as were expressly thereinbefore provided for), but that every lord of the said manor for the time being should and might at all times thereafter enjoy all such rights and privileges (except as aforesaid) in as full, large, and beneficial a manner in all respects whatsoever as he could have done in case this Act had not been made, and that at all times thereafter the lord of the said manor for the time being, and every person who had or claimed to have any right or interest in any of the markets or fairs holden within the limits of this Act, should respectively continue to enjoy all right of holding such fairs and markets in like manner as they were heretofore accustomed to do, and of collecting and receiving the usual toll and other profits belonging to such markets and fairs in like manner as they could or might have done in case this Act had not been passed.

Sect. 32: That this Act should be deemed and taken to be a public Act.

By the Sidmouth Market Act, 1846 (9 & 10 Vict. c. xlviii.), being an Act to alter, amend, and enlarge the powers and provisions of the Sidmouth Market Act, 1839, after reciting that a new market-house had been erected at the proper costs and charges of the said E. H. B. Hughes agreeably to the provisions of the Act of 1839, and a market had since been and was then held at or in the said market-house, in the manner prescribed

by the said Act, and that it was expedient to alter, amend, and enlarge the powers of the said Act, and to make further provisions for effectuating the beneficial purposes of the said Act, and preventing evasions thereof, it was enacted as follows:—

Sect. 1: That all provisions contained in the said Act of 1839, so far as the same were applicable to the provisions and enactments of this Act, should extend to the subjects and purposes of this Act as fully and effectually as if the same were repeated and re-enacted in this Act with reference to such subjects and purposes.

Sect. 2: That no person should hawk, sell, offer, expose, or carry for sale in any barrow, hand-basket, box, cart, pannier, or other thing (inter alia) any vegetables or other article of provision in any place whatsoever within the parish of Sidmouth except at the said market-house on any day before twelve at noon nor after that hour without having first personally attended at the said market-house, or at such other place at Sidmouth as might be fixed by the said E. H. B. Hughes, or his agent, or the owner for the time being of the said market or his agent, and there paid the tolls payable or authorized to be taken in respect of such commodities by the said Act of 1839 or this Act, under a penalty not exceeding 5*l.* for every breach of this provision, recoverable before a justice of the peace for the county of Devon and payable to the owner of the said market for the time being.

Sect. 12: That this Act should be deemed a public Act.

The plaintiff alleged by his statements of claim that the defendants, in breach of the provisions of the said Acts, had been hawking, selling, and offering, exposing, and carrying for sale in the parish of Sidmouth (inter alia) vegetables and other articles, commodities, and things usually sold in public markets without having personally attended in the said market-house or paid the tolls required by the said Acts, such sales being made in a cart both within and beyond half a mile by the nearest usual road from the said market-place and both before and after twelve at noon, and that the defendants refused to pay the tolls and otherwise to comply with the requirements of the said Acts, and threatened and intended to continue to do

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the acts complained of unless restrained by injunction, and that the plaintiff was suffering great loss and damage from the defendants' conduct.

The plaintiff asked for the declaration, injunction, and account above mentioned.

By their defences the defendants submitted (inter alia) that the plaintiff's rights were based solely on the said Acts, which provided complete statutory remedies and modes of enforcing the same, and that the plaintiff was consequently not entitled to pursue any other remedy.

The actions were ordered to be set down on this point of law, the defendants having taken out summonses for this purpose.

R. B. Phillpotts, for the defendants. The proceeding being in the nature of a demurrer, I have the right to begin: *Richards & Co.* v. *Butcher* (1); Annual Practice, 1901, p. 322.

Percy Wheeler (*Macmorran, K.C.*, with him), for the plaintiff. In *Richards & Co.* v. *Butcher* (1) the point was not argued. The demurrer goes to the construction of the Market Acts, on which my claim is mainly based. I have clearly the right to open my case.

FARWELL J. I will not disturb the practice adopted in *Richards & Co.* v. *Butcher*. (1) The defendants have the right to begin.

R. B. Phillpotts. The claim is really based on the statutes alone. The right of taking toll is not necessarily incident to a market: Pease and Chitty on Markets, p. 56; and although the Act of 1839 recites the existence of tolls, there is nothing to shew what they were, so as to support a claim at common law. In any case, the old franchise being increased by statutory provision, its ancient privileges are gone: *Abergavenny Improvement Commissioners* v. *Straker* (2); *Manchester Corporation* v. *Lyons*. (3) The plaintiff, therefore, being unable to sue at common law, and complete statutory remedies being

(1) (1890) 62 L. T. 867. (2) (1889) 42 Ch. D. 83, 89.
(3) (1882) 22 Ch. D. 287.

provided for the new statutory rights, this Court has no jurisdiction in law or equity: Pease and Chitty on Markets, p. 88; *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1); *Barraclough* v. *Brown* (2); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (3)

[FARWELL J. In *Fripp* v. *Chard Ry. Co.* (4) the Court of Chancery appointed a receiver of tolls at the instance of a mortgagee, although the appointment might have been made by the justices.]

In that case the Act provided that nothing therein contained should prejudice the mortgagee's remedies in law or equity.

[FARWELL J. The observations of Herschell L.C. in *Institute of Patent Agents* v. *Lockwood* (5) may perhaps be in your favour, though a Scottish case is not binding on this Court.]

Percy Wheeler, for the plaintiff. The Act of 1839 only provided extra machinery for the recovery of the tolls, the ancient common law right being preserved by s. 31. The disturbance of an ancient market may be restrained by injunction: Kerr on Injunctions, 3rd ed. p. 290; *Elwes* v. *Payne* (6); *Goldsmid* v. *Great Eastern Ry. Co.* (7) Even if the right is purely statutory, the jurisdiction of the High Court can only be ousted by express words in the statute, and not by the mere provision of a statutory remedy: *Earl of Shaftesbury* v. *Russell* (8); *Attorney-General* v. *Aspinall* (9); *Reg.* v. *Buchanan* (10); and the statutory right will be protected by injunction: *Cooper* v. *Whittingham* (11); *Hayward* v. *East London Waterworks Co.* (12); *Birmingham Corporation* v. *Foster.* (13)

R. B. Phillpotts, in reply. In *Attorney-General* v. *Aspinall* (9) it was held that the Act created a trust enforceable by this Court; and in *Birmingham Corporation* v. *Foster* (13) the question of jurisdiction was not raised. Notwithstanding the

(1) (1859) 28 L. J. (C. P.) 242, 246; 6 C. B. (N.S.) 336, 356.
(2) [1897] A. C. 615.
(3) (1877) 2 Ex. D. 441.
(4) (1853) 11 Hare, 241.
(5) [1894] A. C. 347, 361.
(6) (1879) 12 Ch. D. 468.
(7) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.
(8) (1823) 1 B. & C. 666, 674; 25 R. R. 534.
(9) (1836) 1 Keen, 513; (1837) 2 My. & Cr. 613, 627; 45 R. R. 142.
(10) (1846) 8 Q. B. 883, 887.
(11) (1880) 15 Ch. D. 501, 506.
(12) (1884) 28 Ch. D. 138, 146.
(13) (1894) 70 L. T. 371.

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decision in *Cooper* v. *Whittingham* (1), it has been held that the Judicature Acts have not enlarged the powers of the Court in reference to injunctions: *North London Ry. Co.* v. *Great Northern Ry. Co.* (2)

[FARWELL J. That does not touch the first ground for the decision in *Cooper* v. *Whittingham* (1), namely, the ancillary remedy in equity by injunction to protect a right.]

That ancillary remedy ought only to be granted ad interim, i.e., until the statutory remedy can be enforced: *Hayward* v. *East London Waterworks Co.* (3); Kerr on Injunctions, 2nd ed. p. 6. The Legislature clearly intended to make the plaintiff's right enforceable in an inexpensive way by distress or summary proceedings, and not by the expensive process of an injunction in the High Court, subjecting the defendants to imprisonment for any breach thereof: *Institute of Patent Agents* v. *Lockwood.* (4)

FARWELL J. The plaintiff sues in respect of his market rights, which appear on the Sidmouth Market Acts of 1839 and 1846. The defendants take a preliminary point of law which is in effect a plea to the jurisdiction. [Having referred in detail to the Act of 1839, and to the preamble of the Act of 1846, as shewing that the new market-house had been erected, his Lordship continued:—]

The Act of 1839, in my opinion, provides for the substitution of a new market-place in lieu of the old market-place, and new tolls which extend to and include the old tolls, that is to say, there are not two sets of tolls, but the tolls allowed by the Act include the old tolls which are kept alive for the benefit of the lord, so that he is entitled, if he pleases, to those old tolls, but subject to the provision in s. 5 that a list of tolls must be affixed upon conspicuous places in the market-place. Therefore, this is really an Act by way of confirmation of the ancient market, with regulations incident thereto and for the benefit generally of the lord of the manor as the owner of the market and the individuals using the market.

(1) 15 Ch. D. 501, 506.
(2) (1883) 11 Q. B. D. 30, 36.
(3) 28 Ch. D. 138, 146.
(4) [1894] A. C. 347, 361.

It has been argued that this case falls within the third class of cases mentioned by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford*. (1) It is said that this is not a case in which any action at law could lie for disturbance of the market because there is simply a new market created, and a special statutory provision which excludes all others.

The three classes of cases referred to are these: "There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common-law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it." It is, in my opinion, within the first of those classes that this case falls. On the true construction of the Act, I think it has simply re-enacted the old common law right to the market, applying the right to the particular new building when substituted for the old building as authorized by the Act. The new tolls include the old tolls, and the remedies are, by enactment, extended to the whole of them. It is not a case where the statute creates a liability not existing at common law; because there was an old market with a right to some tolls—as is stated in the preamble, "certain customs, tolls, and duties." It really only regulates those ancient rights.

Reg. v. *Buchanan* (2) is a good illustration of this. There an Act contained a distinct absolute prohibition forbidding persons from acting as attorneys unless previously admitted: and by separate clauses provided a special mode of punishment for disobedience: and the Court held that an indictment would lie, notwithstanding the special form of punishment provided.

But even if this were not so, it appears to me that the

(1) 28 L. J. (C. P.) 242, 246; 6 C. B. (N.S.) 336, 356.
(2) 8 Q. B. 883, 887.

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remedy in Chancery, if I am to regard it, as has been argued, as a separate remedy, is wider than the old common law remedy. In my opinion, there was nothing to prevent the old Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy—subject only to this, that the right so created was such a right as the Court under its original jurisdiction would take cognizance of.

It was argued that unless an action at law would lie the Court would not have granted an injunction. I entirely dissent from that view, and I refer to the statement of the law in *Emperor of Austria* v. *Day* (1), as expressed by one of the greatest masters of equity, the late Lord Justice Turner. It was a case in which the Emperor of Austria sought to restrain the printing and dissemination of notes issued by Kossuth, a Hungarian refugee, and made in imitation of notes circulating in Hungary. Turner L.J. says: "It is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition, that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this Court, Lord Redesdale, in his Treatise on Pleading, in enumerating the cases to which the jurisdiction of the Court extends, mentions cases of this class: 'Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal

(1) (1861) 3 D. F. & J. 217, 253.

justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent.' It is plain therefore, that, in the opinion of Lord Redesdale, who was pre-eminently distinguished for his knowledge of the principles of this Court, the jurisdiction of the Court is not limited to cases in which there is a right at law. There is, indeed, a familiar instance in which the jurisdiction is not so limited—the cases of waste . . . . To say that the jurisdiction of this Court is limited only by the principles of universal justice would no doubt be going too far, and I must not be understood so to construe what Lord Redesdale has said. I take the passage to refer to cases in which there is what the law in principle acknowledges to be a wrong, but as to which it gives no remedy, as in the case of waste to which I have referred." Now, if I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so. There certainly is nothing in this Act to that effect.

If authority is needed for that proposition, I think it is to be found in *Attorney-General* v. *Aspinall*. (1) The basis of the decision was, that although there was a new right and a new remedy for the infringement of that right, the right did not consist in the remedy because a trust existed, and the existence of that trust had all its legal consequences, and the cestuis que trust were entitled to all their legal remedies. Lord Cottenham says: "The argument assumes that the machinery provided by the 97th section applies to the case in question, and is not confined to alienations of lands, tenements, and hereditaments for valuable consideration; for, if it be so confined, then the whole foundation of the argument fails. Supposing, however, that the new council had, under this clause, the power of bringing the case in question before a jury, it would be indeed a new remedy; but the right cannot be said to consist in the remedy, inasmuch

(1) 1 Keen, 513; 2 My. & Cr. 613, 627; 45 R. R. 142.

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as the creation of the trust of itself subjected the property to all the other remedies applicable to trusts; and, if this 97th section had not been in the Act at all, the jurisdiction of the Court could not have been disputed; a circumstance which proves that the right does not exist only in the remedy, but that the remedy, if applicable to this case, is afforded merely as another and additional means of enforcing the right. The jurisdiction of this Court cannot be taken away by another jurisdiction having cognizance given to it of the same matter." That reasoning appears to me to apply to the present case. Assume there had been none of these provisions for proceeding before magistrates, there would still have been a right of property in the market declared by the Act of Parliament and, I will assume, against my own view of the construction of the Act, created de novo. That is a right of property to which the ordinary incidents would attach, including the right to protect that property by proceedings in the Chancery Division or in the old Court of Chancery. That appears to me to be well established, and it is borne out by *Cooper* v. *Whittingham*. (1) Jessel M.R. possibly expressed himself rather more generally than he would have done had the case been fully argued; but that *Cooper* v. *Whittingham* (1), on the question of the general jurisdiction of the old Court of Chancery, is sound, apart from anything said on the Judicature Act, seems absolutely plain, and to have been so stated by Chitty J. in *Hayward* v. *East London Waterworks Co.* (2) The defendants have misapprehended the effect of that case. Chitty J. clearly admitted the jurisdiction; but he was dealing with the jurisdiction arising under the second class of cases referred to in Mitford on Pleadings, 5th ed. p. 5, and set out in Kerr on Injunctions, 2nd ed. p. 6—a classification adopted and approved by Turner L.J. in *Pennell* v. *Roy*. (3) Chitty J. was dealing with a case in which there would be the necessity of proceeding before another tribunal, so that the Court of Chancery or the Chancery Division had not the power of deciding the question finally, but could only interfere ad interim. The plaintiff

(1) 15 Ch. D. 501, 506. (2) 28 Ch. D. 138, 145, 146.
(3) (1853) 3 D. M. & G. 126, 138.

sought an injunction to restrain the water company from cutting off the supply of water. The dispute between the parties was as to the amount of water rate to be paid by the plaintiff. The amount of water rate depended on the rateable value of the premises. That rateable value and the amount of rate could only be determined in the mode pointed out by the Act. Chitty J. begins his judgment thus: "A bonâ fide dispute has arisen and still subsists between the plaintiff and the defendant company as to the basis on which the rate ought to be calculated. It is admitted on both sides that the effect of the statutes bearing on the question is that the only tribunal by which such a dispute can be settled is that mentioned in the 68th section of the general Act." The jurisdiction of the Court which was stated to exist was in that case exercisable only ad interim, and fell within the second class of cases mentioned in Mitford on Pleading, namely, the jurisdiction of the Court to keep matters in statu quo, or to prevent irremediable mischief pending the determination of the chief matter in question. Now that this Division exercises all the jurisdiction of both Divisions of the Court, there is no question of sending a matter to be tried at law. Such a case as *Hayward* v. *East London Waterworks Co.* (1) can only arise where there is some special statutory tribunal to determine some question such as was there pending, and where matters ought to be kept in statu quo. Nothing of the sort arises in the present case. There is no provision here as to the assessment or ascertainment of the amount payable for the tolls; they are all determined by the lord of the manor, subject only to the limitation contained in the schedule to the Act of Parliament.

The only matter which is referred to the jurisdiction created by the Act is that mentioned in s. 10, namely, the dispute concerning distress or sale for recovery of tolls. There is nothing there which prevents the Court from determining the final rights between the parties in respect of the matter of property which is referred to, and which is created or re-enacted by the Act of Parliament.

It appears to me, therefore, that the pleas to the jurisdiction

(1) 28 Ch. D. 138, 145, 146.

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are entirely unfounded, and that the summonses must be dismissed with costs in any event.

I ought to have referred to Lord Herschell's dictum in *Institute of Patent Agents* v. *Lockwood.* (1) There really is nothing at all in what I have determined or in any of the cases to which I have referred in any way inconsistent with the language of Lord Herschell, who was referring to the creation of a new offence; nor was it a question of property at all; it was simply that a patent agent who acted without having conformed to some statutory provision—it is immaterial to say what—was liable to a penalty of 20*l.* That would not be within any branch of the ancient jurisdiction of the Court of Chancery; it certainly does not come within any principle on which I have acted to-day, and it appears to me really to be not relevant to the present case.

Solicitors: *Steavenson & Couldwell; Dunn, Baker & Baker, for Dunn & Baker, Exeter.*

G. R. A.

FARWELL J. 1901 March 12, 13.

In re SPINDLER AND MEAR'S CONTRACT.

[1900 S. 2790.]

Vendor and Purchaser—Conditions of Sale—Rescission—Pending Litigation—Costs—Jurisdiction.

A condition of sale providing that if the purchaser should insist on any requisition which the vendors should be unwilling to comply with, and should not withdraw the same after being required so to do, the vendors should (notwithstanding "any intermediate or pending negotiation, proceeding, or litigation") be at liberty to rescind the contract, and should thereupon return to the purchaser his deposit, "but without any interest, costs of investigating the title, or other compensation or payment whatsoever," does not oust the jurisdiction of the Court to order the vendors to pay the costs of a litigation pending at the date of rescission.

Duddell v. *Simpson*, (1866) L. R. 2 Ch. 102, 108, followed.

VENDOR AND PURCHASER SUMMONS.

By a contract dated June 19, 1900, the vendors agreed to sell certain freehold property to the purchaser, August 8, 1900, being the date fixed for completion.

(1) [1894] A. C. 347, 361.

The contract provided (condition 8) that "If the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to remove or comply with, and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same, or that there shall have been any intermediate or pending negotiation, proceeding, or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatsoever."

The vendors having declined to comply with some of the purchaser's requisitions, the purchaser issued this summons on July 24, 1900, asking for a declaration that a good title had not been shewn, and for return of the deposit. Both parties filed evidence in support of their respective contentions.

On March 12, 1901, the day the summons was in the paper for hearing, the vendors' solicitors gave the purchaser written notice, under condition 8, that the vendors were unwilling to comply with his requisitions, and requiring him forthwith to withdraw the same, failing which the vendors intended to rescind the contract and return the deposit. The purchaser declined to withdraw the requisitions; whereupon the vendors rescinded the contract, and tendered the deposit.

The purchaser did not object to rescission, but asked that the vendors should be ordered to pay the costs of the proceedings. The question was whether, having regard to condition 8, the Court had jurisdiction to make this order.

Butcher, *K.C.*, and *W. F. Phillpotts*, for the purchaser. Condition 8 does not oust the jurisdiction of the Court as to costs of litigation: *Duddell* v. *Simpson* (1); *Isaacs* v. *Towell* (2); *Best* v. *Hamand* (3); and under the circumstances the vendors ought to pay them.

Upjohn, *K.C.*, and *Beaumont*, for the vendors. In *Duddell*

(1) L. R. 2 Ch. 102, 108.
(2) [1898] 2 Ch. 285.
(3) (1879) 12 Ch. D. 1, 6.

FARWELL J. 1901 SPINDLER AND MEAR'S CONTRACT, *In re.*

v. *Simpson* (1) and *Isaacs* v. *Towell* (2) the question as to jurisdiction was not raised. The judgment of Hall V.-C. in *Best* v. *Hamand* (3) was reversed on appeal, and although only reversed on grounds not touching the question of jurisdiction, it cannot be treated as a binding authority on that question.

Condition 8 entitled us to rescind at any time before judgment: *In re Arbib and Class's Contract* (4); and barred the purchaser's right to any compensation or payment whatsoever beyond the return of the deposit.

Even if there is jurisdiction, we ought not to be ordered to pay costs unless the merits of the case are gone into.

FARWELL J. I am unable to distinguish condition 8 from the similar condition in *Duddell* v. *Simpson*. (1) I cannot suppose that Turner and Cairns L.JJ., in ordering the vendor to pay the costs of litigation down to the time the notice to rescind was given, can have overlooked the words of the condition which are set out in the report in inverted commas. They must have considered that, notwithstanding the condition, they had jurisdiction to order the vendor to pay those costs. The fact that the grounds of the decision are not stated does not make the decision the less binding on me. They probably considered that as the condition expressly mentioned "cost of investigating the title," it impliedly excluded costs of litigation, and did not oust the jurisdiction of the Court in that respect.

I hold, therefore, that I have jurisdiction in the matter, and, although the merits of the case have not been gone into, I think the vendors were unreasonable in allowing the proceedings to go on instead of giving notice to rescind directly the summons was issued, thereby causing the purchaser to incur costs up to the last moment, when they thought better of their position and determined to rescind. Under the circumstances I think I have ample ground for ordering them to pay the costs of the proceedings.

Solicitors: *H. Mear; Upton & Britton.*

(1) L. R. 2 Ch. 102, 108.
(2) [1898] 2 Ch. 285.
(3) 12 Ch. D. 1, 6.
(4) [1891] 1 Ch. 601, 612, 614, 616.

G. R. A.

WHITBREAD & CO., LIMITED *v.* WATT.

FARWELL J.

1901

March 21, 22.

[1901 W. 285.]

Vendor and Purchaser—Contract to buy Plot on a Building Estate—Deposit—Vendor to erect specified number of Houses—Option to Purchaser to rescind if Houses not built—Alienation of Building Estate with Notice of Contract—Rescission of Contract by Purchaser—Lien for Deposit.

A. contracted with B. to purchase a plot of land on a building estate, the purchase to be completed when 300 houses had been built on the estate; and, if the houses were not built by a certain date, A. had an option to cancel the contract. B. mortgaged the estate to C., who sold under his power of sale to D. with notice of the contract. The houses were not built, and subsequently A. gave D. notice cancelling the contract:—

Held, that A., as against D., had a lien on the property for the deposit he had paid B. on signing the contract.

Rose v. *Watson*, (1864) 10 H. L. C. 672, followed.

Dictum of Kay L.J. in *Rodger* v. *Harrison*, [1893] 1 Q. B. 173-4, dissented from.

By a contract in writing dated January 25, 1897, and made between F. Saunders (as vendor) of the one part, and the plaintiffs (as purchasers) of the other part, the vendor agreed to sell and the purchasers to purchase a freehold public-house plot on a certain building estate of the vendor's, known as the Woodhouse estate, for the sum of 500*l.*, to be paid as to 200*l.* by way of deposit on the signing of the contract, and as to the balance of 300*l.* on the completion of the purchase with interest, as therein mentioned. The contract provided (amongst other things) as follows:—

"Clause 3. The purchase is to be completed as soon as 300 houses shall have been erected on the said estate (but without prejudice to clause 10 hereof) at the office of the vendor's solicitors, and the purchasers are to have possession as from the day of completion, when the balance of purchase-money with interest as aforesaid is to be paid. All outgoings up to that time will be cleared by the vendor, his heirs or assigns."

Clause 9. This was the usual condition enabling the vendor

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to cancel the contract if the purchasers made any requisition which the vendor should be unable or unwilling to comply with.

"Clause 10. If 300 houses shall not be erected on the said Woodhouse estate within two years from the date of this agreement, the purchasers shall have the right, by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement, and at the expiration of such seven days the agreement shall absolutely cease and determine.

"Clause 11. In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss, or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit without interest shall be returned by the vendor to the purchasers."

The plaintiffs paid the vendor (Saunders) the deposit of 200*l.* on signing this contract. Subsequently Saunders sold and conveyed the Woodhouse estate to one Saxelby, who mortgaged it; and in November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt with notice of the contract of January 25, 1897. The 300 houses had not been built on the estate, nor had Saunders paid or accounted for the deposit to any of his successors in title. On December 3, 1900, the plaintiffs wrote to the defendant rescinding the contract of January 25, 1897, and claiming payment of the deposit (200*l.*), which was refused.

This was an originating summons by the plaintiffs claiming (1.) a declaration that under the contract of January 25, 1897, they were entitled to a charge or lien on the hereditaments therein described by way of security for the repayment of the deposit of 200*l.* paid by them to Saunders on signing the said contract, and (2.) enforcement of the said security by foreclosure or sale.

Hon. Frank Russell, for the plaintiffs. I do not say that the defendant is personally liable to pay the 200*l.*, but I contend that under the circumstances the plaintiffs have a lien on the

property for the deposit: *Wythes* v. *Lee* (1); *Rose* v. *Watson*. (2)

Brinton, for the defendant. *Rose* v. *Watson* (2) does not apply. The stipulation to build 300 houses was a personal obligation on the part of Saunders, and did not run with the land. The general rule is that unless there is default on the part of the vendor there is only a debt and no lien: *Williams* v. *Edwards* (3); *Dinn* v. *Grant* (4): per Kay L.J. in *Rodger* v. *Harrison*. (5) Here, there was no necessity to build the houses, and the purchaser had an option to cancel the contract. He has exercised that option and let the land go, and has now no claim on it in the hands of the defendant. His only remedy is against Saunders, who had the money. [He also cited *Howe* v. *Smith* (6); *Levy* v. *Stogdon* (7); *Cornwall* v. *Henson*. (8)]

FARWELL J., after stating the facts, continued:—The 300 houses have not been built, and on December 3, 1900, the plaintiffs gave the defendant notice to rescind, and on their behalf it is contended that they have a lien for their deposit on the estate in the hands of the defendant. On the other hand, it is said that the lien arises only on the vendor's default, and depends upon his default. I think counsel for the defendant shrank a little from putting his argument in that bare form, but that is the substance of it. This is inconsistent with the law as settled by the authorities, and well stated in Robbins on Mortgages, vol. ii. p. 1376: "If a purchaser advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the purchaser has a lien on the land; and if the purchaser properly declines to complete, he has a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments, and also for the costs of a suit by himself or the vendor to compel performance of the contract, and this lien attaches on the deeds. If the purchase goes off

(1) (1855) 3 Drew. 396, 402; compromised on appeal, see 25 L. J. (Ch.) 389.
(2) 10 H. L. C. 672.
(3) (1827) 2 Sim. 78; 29 R. R. 61.
(4) (1852) 5 De G. & Sm. 451.
(5) [1893] 1 Q. B. 161, 173–4.
(6) (1884) 27 Ch. D. 89.
(7) [1898] 1 Ch. 478.
(8) [1899] 2 Ch. 710.

FARWELL J. 1901 WHITBREAD & Co., LIMITED v. WATT.

through the fault of the purchaser, of course he has no lien for what he has paid." That seems to me to be a complete and accurate statement of the law. Then, in *Wythes* v. *Lee* (1) Kindersley V.-C. contrasts the case of a purchaser and a vendor, and what he says is quite consistent with an absence of any wrong-doing or default. He says: "This is clear, that the *vendor*, if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the *purchaser*, if the contract goes off, stand in principle on the same footing as that of the vendor?" Then, after considering that aspect of the case, he says: "When a contract is made, and then goes off, it appears to me, that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance." The matter came before the House of Lords in *Rose* v. *Watson*. (2) That case, to my mind, is on all fours with the present. There was first a contract, then a mortgage with notice, and then default by the vendor, and the House of Lords held that the purchaser who had paid a deposit had a charge for that deposit and interest in priority to the mortgagees. It is put by Lord Cranworth thus (3): "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." And Lord Westbury in the same case had previously pointed out that the money paid in conformity with the contract was part of the purchase-money under the contract, and said (4): "It was money advanced upon the faith

(1) 3 Drew. 396, 403.
(2) 10 H. L. C. 672.
(3) 10 H. L. C. 683.
(4) Ibid. 682.

that the land, the subject of the contract, would become the property of the respondent; and being so paid as part of the purchase-money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, I think that your Lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of the payment of them; in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently—that is to say, they entitled the person who is possessed of that lien to claim interest in respect of them." The lien is created by the contract under which the money is paid as part of the purchase-money, and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, but the lien arises from the contract. I see no reason why a condition that, if 300 houses are not built, the purchaser may rescind should be held to differ in any way from the ordinary condition in a contract that, if the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with, the vendor may rescind. There is no default there, but I venture to think it would not be arguable, and I do not think counsel for the defendant contended, that the purchaser in such a case would have no right to a lien in the same way as if the purchase went off by reason of want of title on the part of the vendor. It is not default. It is rather misfortune. I hold, therefore, that on authority and on principle the purchaser has a lien, both when the contract goes off for want of title and when the contract is rescinded under a condition enabling the purchaser to rescind. If the purchaser himself makes default the case is entirely different. If the purchaser makes default in such a way as to deprive himself of any debt at all, he cannot have a lien for that which does not exist. The only authority against the view which I have expressed is a dictum of Kay L.J. in *Rodger* v. *Harrison* (1); and if the Lord Justice was right in

(1) [1893] 1 Q. B. 161, 174.

FARWELL J. 1901 WHITBREAD & CO., LIMITED v. WATT.

that expression of opinion, it is, no doubt, decisive of the present case. The dictum was not necessary for the decision of the case before him, the point in which was the meaning of the word "assurance" in the Yorkshire Registries Act, 1884. The Lord Justice says: "If there be a lien for the purchase-money paid, when does that lien come into existence? Certainly not at the date of the contract. It cannot then be assumed that the contract will go off by default of the vendor. The purchaser's right then is to have the land itself." With every respect to the Lord Justice, that is not accurate. It is directly in the teeth of the decision in *Rose* v. *Watson* (1), in which the lien was anterior to the default; *Rose* v. *Watson* (1) was not cited to him, and could certainly not have been present to his mind.

Solicitors for plaintiffs: *Martineau & Reid.*
Solicitor for defendant: *H. P. Spottiswoode.*

H. L. F.

FARWELL J. 1901 *Feb.* 26.

In re BIRD.
In re EVANS.
DODD *v.* EVANS.

[1894 B. 5775.]

Tenant for Life and Remainderman—Apportionment—Unauthorized Investment—Loss.

Where a trustee, without the knowledge of the tenant for life or remainderman, sells out an authorized investment and places the proceeds on an unauthorized investment which results in a partial loss of income and capital, the tenant for life is entitled to such a proportion of the amount realized by the unauthorized investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorized investment in the same period bear to the capital value of the authorized investment plus those dividends, the tenant for life being liable to bring into account all income he received from the unauthorized investment, although not liable to refund.

FURTHER CONSIDERATION.

On March 16, 1885, John Carbery Evans, the trustee of funds settled by the will of Thomas Bird, hereinafter called

(1) 10 H. L. C. 672.

the testator, without the knowledge of the tenant for life or remaindermen and in breach of trust, invested 10,000*l.*, the proceeds of sale of 10,021*l.* Consols, part of the settled funds, at 4 per cent. on an equitable mortgage of real property belonging to himself and known as the Merton Grange and Paine's estates, Cambridgeshire, the interest on which was regularly paid by the trustee or his executor up to March 10, 1894, when it fell into arrear. The trustee died on June 1, 1893, and on December 19, 1894, the plaintiffs, who were some of the remaindermen, having discovered the breach of trust, commenced this action against the trustee's executor and others to administer the estates of the testator and the trustee.

On May 18, 1895, North J. pronounced judgment, declaring that the investment of the 10,000*l.* was a breach of trust, and that the trustee's executor was liable out of the assets of the trustee to pay that amount to the trustees of the testator's will when appointed with interest at 4 per cent. per annum from the date of the investment until payment, and that until payment that amount and interest should stand charged upon the Merton Grange and Paine's estates, and ordering (inter alia) administration of the real and personal estate of the trustee.

New trustees of the testator's will were subsequently appointed and added as defendants. A receiver of the rents of the mortgaged estates was appointed, and these estates were gradually sold during the years 1895 to 1897, the proceeds being paid into court and invested in New Consols, and various payments being made to the tenant for life out of the rents and dividends until her death on February 25, 1900.

By the master's general certificate of January 25, 1901, which incorporated the results of previous certificates, it was certified that the tenant for life had received from the trustee or his executor 3400*l.* on account of the income of the investment in seventeen half-yearly payments of 200*l.*, beginning February 6, 1886, and ending March 10, 1894; and that since that date she had received from the trustee's executor, or the receiver in the action, or under orders of the Court, a further sum of 666*l.*, making a total of 4066*l.* paid to her on the account aforesaid up to her death.

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It was also certified that the net proceeds of sale of the mortgaged estates were represented by a sum of 6629*l.* New Consols and 173*l.* cash in court to the credit of the action "Proceeds of sale of John Carbery Evans' real estates known as Merton Grange and Paine's estates," and by a sum of 39*l.* which had been raised by a sale of 35*l.* New Consols for repairs of other estates, and was now to be repaid to this account.

The trustee's estate being of no appreciable value, one of the questions on the further consideration was how the fund in court ought to be divided as between the estate of the tenant for life and the remaindermen, so as to apportion the loss fairly between them.

Butcher, K.C., and *K. G. Metcalfe*, for the plaintiffs. The aggregate amount of income and capital actually produced by the investment, after deducting accretions since the death of the tenant for life, which belong to the remaindermen, must be divided as between tenant for life and remaindermen in the proportion which the total interest the tenant for life would have received on 10,021*l.* Consols from the date of the wrongful investment to her death bears to the value of 10,021*l.* Consols at that date, and the executor of the tenant for life must give credit for the whole of the 4066*l.* actually received on account of income since the date of the wrongful investment: *In re Foster.* (1)

Upjohn, K.C., and *Martelli*, for the executor of the tenant for life. The principle of *In re Foster* (1), which is confined to the case of a mortgagee in possession—*In re Barker* (2)—was not followed in *Lyon* v. *Mitchell.* (3)

The account must only be taken from March 10, 1894, when the interest first fell into arrear, and the funds in court must be divided in the proportion which the arrears of interest at the death of the tenant for life bore to the value of 10,021*l.* Consols at that date: *In re Moore* (4); *In re Barker* (2); *Lyon* v. *Mitchell.* (3) The arrears should be calculated at 4 per cent., that being the mortgage interest.

(1) (1890) 45 Ch. D. 629.
(2) W. N. (1897) 154.
(3) W. N. (1899) 27.
(4) (1885) 54 L. J. (Ch.) 432.

[FARWELL J. Is that so, seeing that the mortgage was a breach of trust?]

The tenant for life was not responsible for that, but under the circumstances we are willing to calculate the arrears at $2\frac{3}{4}$ per cent., the present interest on Consols.

Even if the principle of *In re Foster* (1) is applied, the account should only be taken from March 10, 1894, and the executor of the tenant for life should only give credit for the 666*l.* received since that date. The plaintiffs are not entitled to make the estate of the tenant for life recoup income paid in respect of an unauthorized investment of which she had no knowledge: *Bate* v. *Hooper*. (2)

FARWELL J. The question I have to answer is how the loss caused by the breach of trust is to be borne. The authorities are in a perplexing condition, and I am unable to reconcile the decision of Pearson J. in *In re Moore* (3) with that of Kay J. in *In re Foster*. (1) The present case is distinguishable from both those authorities, as in neither of them was the loss caused by a breach of trust. I think the true principle is that stated by James V.-C. in *Cox* v. *Cox* (4): "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund."

Applying this principle, I have first to ascertain what the fund for division ought to be, on the assumption that the sale and wrongful investment never took place. In that case there would have been 10,021*l.* Consols for division, and the tenant for life would have received the interest on those Consols down to her death. As a matter of fact she received altogether the sum of 4066*l.* in respect of the income of the wrongful investment. She was in no way responsible for, or indeed cognizant

(1) 45 Ch. D. 629.
(2) (1855) 5 D. M. & G. 338.
(3) 54 L. J. (Ch.) 432.
(4) (1869) L. R. 8 Eq. 343, 344.

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of, the breach of trust, and I could not order her executor to refund any portion of this income. But I am dealing with a case of adjustment of a loss as between tenant for life and remainderman, and so long as any funds are available for that purpose I must so apportion them as to throw the loss on income and capital rateably. The proper method of doing this is to ascertain the total amount of the dividends on 10,021*l.* Consols that the tenant for life would have received if the sale and wrongful investment had not been made, and also to ascertain the value of 10,021*l.* Consols at her death, the proper time for distributing the fund. This will shew the amounts that ought to have been available for income and capital respectively. On the other hand, the fund in court plus the 4066*l.* income actually received minus accretions since the death of the tenant for life, which accretions belong to the remaindermen, gives the aggregate amount actually produced by the wrongful investment up to the death of the tenant for life.

In order to throw the loss on income and capital rateably, this aggregate must be divided between the estate of the tenant for life and the remaindermen according to the rule in *In re Foster* (1)—i.e., in the proportion which the total amount of dividends that the tenant for life would have received on the 10,021*l.* Consols from the date of the wrongful investment to her death bears to the value of 10,021*l.* Consols at her death, her executor giving credit for the 4066*l.* actually received, but not being liable to refund any overpayment for the reason above stated.

Whether this is the proper mode of apportionment in a case where the loss has not arisen from a breach of trust is not for me to determine. There was a breach of trust in the present case, and I must restore the status quo ante as far as the funds available will permit.

Solicitors: *Gasquet & Metcalfe; Pollock & Co.; James Ebenezer Mason.*

(1) 45 Ch. D. 629.

G. R. A.

FARWELL J.
1901
March 20.

In re SELOUS.
THOMSON *v.* SELOUS.

[1901 S. 159.]

Merger—Equitable Tenancy in Common—Legal Joint Tenancy.

Where equitable and legal estates, equal and coextensive, unite in the same persons, the former merges, although the former is a tenancy in common and the latter a joint tenancy.

Selby v. *Alston*, (1797) 3 Ves. 339; 4 R. R. 10, followed and extended.

ORIGINATING SUMMONS.

A testator who died on September 24, 1890, bequeathed a leasehold messuage to a trustee in trust for two of his daughters in equal shares as tenants in common. By an indenture dated June 24, 1895, and made between the trustee of the one part and the daughters of the other part, after reciting the above bequest and reciting that the daughters had requested the trustee to execute such assignment to them of the said messuage as was thereinafter expressed, it was witnessed that the trustee, at the request and by the direction of the daughters, assigned the messuage to the daughters to hold the same unto the daughters as joint tenants for the residue of the lease, the daughters entering into a joint covenant with the trustee to pay the rent and perform the covenants of the lease, and to indemnify the trustee against all claims on account of the same.

One of the daughters having died on September 15, 1900, this summons was issued to determine (inter alia) whether an equitable moiety of the leasehold messuage belonged to her estate, or whether the entirety belonged to the surviving daughter.

Jason Smith, for the deceased daughter's executors. The assignment of June 24, 1895, only created a joint tenancy of the legal estate, the daughters holding that estate in trust for themselves as tenants in common. The equitable estate did not merge in the legal estate, as these estates were not coextensive, or commensurate, or of the same quality.

FARWELL J. 1901 SELOUS, *In re.* THOMSON *v.* SELOUS.

It is a common practice to convey freeholds and leaseholds to partners as joint tenants in trust for themselves as part of their co-partnership estate: 1 Key and Elphinstone's Conveyancing, 6th ed. 405; and it has never been suggested that they become joint tenants in equity. We are therefore entitled to the equitable interest in one moiety of the messuage.

T. T. Method, for the surviving daughter. Where equitable and legal estates, equal and coextensive, unite in the same person, the former merges: *Selby* v. *Alston* (1); *Lee* v. *Lee* (2); *In re Douglas*. (3) The same rule must apply where they unite in two persons, and for the purpose of merger a tenancy in common must be treated as equal and coextensive with a joint tenancy. The surviving daughter is, therefore, entitled to the entirety.

Rayner Goddard and *Bovill*, for other parties to the summons.

FARWELL J. In my opinion the assignment of June 24, 1895, created a joint tenancy in law and equity. It has been contended that it only created a joint tenancy of the legal estate, and that the equitable tenancy in common remained unaffected, the daughters merely holding the legal estate as joint tenants in trust for themselves as tenants in common. But I do not think that is the true view. The rule in *Selby* v. *Alston* (1), namely, that where equitable and legal estates, equal and coextensive, unite in the same person, the former merges, or, in other words, that a person cannot be trustee for himself, applies to a case where such estates unite in two or more persons. The only doubt I felt was whether the advantage of a tenancy in common over a joint tenancy raised any presumption against merger. But the difference in interest between these two estates is so small and shadowy that I do not think it would be sufficient to raise that presumption. I hold that two or more persons cannot be trustees for themselves for an estate coextensive with their legal estate.

Solicitors: *R. S. Taylor, Son & Humbert.*

(1) 3 Ves. 339; 4 R. R. 10. (2) (1876) 4 Ch. D. 175.
(3) (1884) 28 Ch. D. 327.

G. R. A.

In re GASELEE.

BUCKLEY J.

1901

March 13.

[1900 G. 4.]

Practice—Costs—Purchase-money in Court—Interim Investment—Brokerage and other Charges—Railway Stock—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 70, 80—*Rules of Supreme Court*, 1883, *Order* XXII., *r.* 17 (1) (1888)—*Form of Order considered.*

The costs payable by the promoters for an interim investment of money paid into court under the Lands Clauses Act, 1845, in any of the securities sanctioned by the Court, include the increased cost of brokerage and other charges occasioned by an investment in railway stock.

Form of order discussed.

ADJOURNED SUMMONS.

The question raised by this application was, the liability of promoters, under s. 80 of the Lands Clauses Consolidation Act, 1845, to pay the increased costs occasioned by an interim investment in railway stock, instead of in "Government securities." The facts were as follows:—

Land, of which one Henry Gaselee was tenant for life, had been taken compulsorily by the London County Council under their General Powers Act, 1897, and the purchase-money, amounting to 7081*l.*, had been paid into court. The tenant for life applied by originating summons under Order LV. for an interim investment of this cash in court, in approximately equal moieties, in two of the following investments: (1.) 3½ per cent. Preference Stock of the Great Eastern Railway Company; (2.) Joint Line "A" 3 per cent. Rent-charge Stock of the Midland and Great Northern Railway Companies; (3.) 4 per cent. Preference Stock of the Metropolitan Railway Company; (4.) 3 per cent. Debenture Stock of the Lambeth Waterworks Company; (5.) 3 per cent. Debenture Stock of the Southwark and Vauxhall Water Company.

An order for interim investment was made in chambers which, as drawn up by the registrar, and so far as material, was as follows: "And the applicant by his solicitors undertaking to pay to the Chancery broker the brokerage and other

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charges on the investment in the schedule hereto directed—It is ordered" that the fund in court be dealt with as in the said schedule directed; and it was further ordered, pursuant to the Lands Clauses Consolidation Act, 1845, s. 80, that the London County Council should pay the applicant "his costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order, and of the investment therein directed, and of all proceedings relating thereto, such costs to be taxed by the taxing master in case the parties differ." The payment schedule directed the investment "without deducting brokerage and other charges" of the money on deposit in approximately equal moieties in two of the first three investments mentioned in the summons, namely, Great Eastern Railway Preference Stock, Midland and Great Northern Rent-charge Stock, and Metropolitan Railway Preference Stock. As the London County Council objected to the insertion in the order of the words "and other charges," and also contended that they were not liable to pay, on an interim investment, more than the costs of investing in "Government or real securities," as mentioned in s. 80 of the Lands Clauses Act, the summons was adjourned into court.

It appeared that the brokerage on Government stocks was 2*s.* 6*d.* per cent., and the brokerage on the railway stock mentioned in the order was 10*s.* per cent.; that no stamp duty was payable on a transfer of Government securities, while a stamp duty was payable on a transfer of railway stock, unless the railway company had compounded for stamp duty on the issue of this particular stock. In some cases a registration fee was also demanded.

S. Dickinson, for the tenant for life. The intention of s. 80 of the Lands Clauses Act was that all the costs of an interim investment of the purchase-money of land taken under the compulsory powers of the Act should be borne by the promoters: the intention of the Act was considered in *In re Bethlem Hospital.* (1) Subsequent legislation, and Order XXII., r. 17 (1), have largely increased the class of Court investments.

(1) (1875) L. R. 19 Eq. 457.

Money paid into court under the Lands Clauses Act is "cash under the control of the Court," and may be invested in any of the securities sanctioned by the Court: *Ex parte St. John Baptist College, Oxford* (1); therefore "costs according to the Act" must now be taken to cover all the increased costs of an interim investment in any securities now sanctioned by the Court for the investment of cash under its control; for this reason the words in the order "and other charges" is now quite right, as this makes it clear that not only extra "brokerage," but stamps and registration fees, if necessary, are to be also paid for by the promoters. The practice is, as stated in Seton on Judgments, 5th ed. vol. iii. p. 2014, for the applicant to pay the brokerage in the first instance, and he charges it in his bill of costs against the promoters, and unless these words "and other charges" stand, he will not be allowed stamps and registration fees when his bill of costs is taxed.

[BUCKLEY J. The question what part of the "other charges" are "reasonable charges and expenses" to be paid by the county council cannot properly arise until taxation. When the bill has been taxed, then if either party think the taxing master has not allowed enough, his decision can be reviewed by the Court. The form of the order is quite right. The question raised is premature.]

Frederic Thompson, for the London County Council. If these words "and other charges" are allowed to stand, I am told the taxing master will certainly allow stamps and registration fees if payable. The respondents as well as the applicant would like to have the principle determined now.

[It was ultimately arranged that the whole question of the costs of this investment should be proceeded with and decided on the present application.]

S. Dickinson. The whole cost of this investment, including the increased brokerage, stamps, and registration fee necessary to carry out this interim investment in modern Court securities, should be paid by the promoters. In *In re Brown* (2) the costs of an investment in Preference Stock of the Great Northern Railway were allowed: this case inferentially decides that the

(1) (1882) 22 Ch. D. 93. (2) (1890) 59 L. J. (Ch.) 530.

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increased brokerage is payable by the promoters; no distinction can be made as to any portion of the costs; it is the costs of the investment as a whole that are payable by the promoters.

Frederic Thompson, for the London County Council. The costs for which the promoters are liable ought not to exceed the costs of an investment in Consols or Government securities; we ought not to have to pay the increased brokerage incurred by reason of this investment being made in railway stock, and we are certainly not liable to pay stamp duty or registration fees; for this reason the words "and other charges" in the order are wrong. The fact that cash under the control of the Court may now be invested in a wider range of securities is no ground for extending the statutory liability of promoters. The question of the increased cost of brokerage does not seem to have been raised at all in *In re Brown* (1): the main question was the jurisdiction of the Court to order costs at all against the railway company under the somewhat unusual circumstances of that case.

BUCKLEY J. This is an application by a tenant for life asking that a sum of 7081*l.* in court, representing the purchase-money of land taken by the London County Council under their compulsory powers, may be invested in approximately equal moieties in two of five investments specified in the summons, and the question I have to decide is whether, under s. 80 of the Lands Clauses Act, 1845, "the costs of the investment of such moneys in Government or real securities," being the securities mentioned in s. 70 as those authorized for an interim investment, include the costs of an investment in other duly authorized Court securities.

The applicant desires to have this money invested in any two of the following securities: [His Lordship read the securities set out in the summons, and continued:—] And it is admitted that the brokerage and other charges for investing in these securities will be higher than the brokerage chargeable for an investment in 3 per cent. Consolidated or 3 per cent. Reduced Bank Annuities or in Government securities as men-

(1) 59 L. J. (Ch.) 530.

tioned in s. 70 of the Lands Clauses Act, 1845. The order for investment, as drawn up, contains the following undertaking: "And the applicant by his solicitors undertaking to pay to the Chancery broker the brokerage and other charges on the investment in the schedule hereto directed," and then goes on to direct the fund in court to be dealt with as in the said schedule directed, that is, to invest the money in court "without deducting brokerage and other charges" in two of the first three investments specified in the summons, and then it proceeds, pursuant to s. 80, to order the London County Council to pay the applicant "his costs (including all reasonable charges and expenses incident thereto) of obtaining this order and of the investment therein directed," such costs to be taxed in case the parties differ. The applicant will thus have in the first instance to pay the Chancery broker the "brokerage and other charges," whatever they may be, and the London County Council will have to repay him pursuant to the latter part of the order. It is said that this order is wrong in point of form in containing an undertaking to pay brokerage "and other charges." In my opinion this is not so: the order is quite right: the applicant must in any case pay the charges, whatever they are. On the matter coming before the taxing master he would determine what part of "the brokerage and other charges" were "reasonable costs and expenses" to be paid by the county council. After taxation, if the parties were not satisfied with the taxing master's allowances, the matter could be brought before a judge to review his finding; so that really the question I am asked to decide is premature, and I might have dismissed this application and left the matter to be determined after the costs had been taxed in the usual way; but as both parties are desirous of having the question of principle determined now, I am willing to do so.

By orders made since 1845, purchase-money paid into court, which is "cash under the control of the Court," as this is, has become capable of being invested in numerous securities other than those authorized by s. 70 of the Lands Clauses Act, 1845. Is it the spirit and intention of that Act to throw the increased costs of present duly authorized investments on

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the promoters of undertakings when exercising their compulsory powers? In my opinion it is. The object of s. 80 of the Lands Clauses Act was, that if the promoters of an undertaking wanted to take the land of an owner against his will, they must, in a case like the present, pay the cost of an interim investment of the purchase-money in Government or real securities, and of the ultimate reinvestment in the purchase of other land; by s. 70 interim investments might be made in 3 per cent. and Reduced Annuities, and in Government or real securities; by subsequent legislation and under the provisions of certain orders, the class of securities authorized for an investment of cash under the control of the Court has been very considerably enlarged. The spirit and intention of the Act was considered in *In re Bethlem Hospital.* (1) In that case Sir George Jessel had before him the question of the liability of a railway company to pay the costs of the application of the purchase-money of land compulsorily taken, in the redemption of the land tax on other lands of the hospital, and he decided that the railway company must pay these costs upon two grounds: first, that whether the purchase of land tax was a reinvestment in land within the meaning of the Lands Clauses Act or not, the spirit and intention of that Act was, that all costs of this nature were to be borne by the railway company; and, secondly, that the redemption of the land tax was a reinvestment in the purchase of other lands, within the meaning of the Act, according to Lord Romilly's earlier decision in *In re London, Brighton and South Coast Ry. Co.* (2) He says this at the beginning of his judgment: "The Lands Clauses Consolidation Act, 1845, does not in words make the costs with which it is now sought to charge the railway company payable by them." (That is exactly how the case before me stands, in words (s. 80) it only makes the London County Council liable to pay the costs of an investment in Government or real securities, and of the reinvestments in the purchase of lands.) But the Master of the Rolls goes on: "It has been decided that an order may be made for payment of costs, although no express words can be found authorizing it.

(1) L. R. 19 Eq. 457. (2) (1854) 18 Beav. 608.

One remarkable instance of this is the case of *In re Earl of Berkeley's Will.* (1)" Then he states what his own views were as to the spirit and meaning of the Act in that case, and he quotes the judgment of James L.J., where he says (2): "The sum which the company have paid is now in court, and ought to be reinvested in land; but this ought to be done according to equitable principles, and the costs, charges, and expenses of the agent, properly incurred, ought in the first place to be paid out of the fund." Then he examines several other cases which had been cited to him, and at the bottom of p. 460, referring to *Ex parte Trafford* (3), he says: "I understand him" (that is Lord Abinger) "to draw a distinction between the spirit of an Act, or that which a judge conceives to be the spirit of an Act, and the intention, which, though not expressed in precise words, may be gathered from considering the terms of the enactment, and which amounts in fact to a species of construction; he thinks that unless he can find the latter he cannot make the order," and goes on to say that Lord Abinger found the stronger expression which he required and made the order. That is an authority for the proposition that I am entitled to look at the intention of the Lands Clauses Act, 1845, under the present altered circumstances, having regard to the more extended range of investments now authorized by the Court, to see whether the extra costs occasioned by an investment in more modern securities may not also be properly payable by the promoters.

It is plain since the case of *Ex parte St. John Baptist College, Oxford* (4), that money paid into court, as this is, is "cash under the control of the Court," and may be invested in any of the securities sanctioned by the Court; it is also plain that the investments it is proposed to make in the present case are investments in securities now sanctioned by the Court, and I am therefore of opinion that the London County Council are liable to pay the costs of investing in these securities, including, if necessary, the increased cost of brokerage and other charges.

(1) (1874) L. R. 10 Ch. 56, 58.
(2) L. R. 19 Eq. 459.
(3) (1837) 2 Y. & C. Ex. 522; 47 R. R. 451.
(4) 22 Ch. D. 93.

BUCKLEY J. 1901 GASELEE, *In re.*

Another case which has been referred to, *In re Brown* (1), is of some assistance, though it does not expressly decide the present point. In that case a sum of money had been paid into court to the account of a lunatic ex parte the Midland Railway Company and invested in Consols. Owing to the compulsory conversion of Consols, under the provisions of the National Debt Redemption Act, 1889, the investment was replaced by a sum of money, and a petition was presented by the committee of the lunatic that the cash in court might be invested in Preference Stock of the Great Northern Railway. The petition was heard by Lindley and Bowen L.JJ. in the first instance, when the order for investment was made as prayed, and the Midland Railway Company were ordered to pay the costs of the application and of the investment except so far as the costs of investment might have been increased by reason of the redemption money exceeding the purchase-money originally paid. This order came again before the Court for further argument, when it was decided that the Court had power to sanction the investment of the sum in court in the way asked for by the petition, and, secondly, that the railway company ought to pay the costs of the application and of the investment. It is plain from the report of the case, that the question as to how much of the costs of the application and investment were to be borne by the railway company was drawn to the attention of the Court, because the exception above stated was made. It does not appear that the exact point as to the difference in the amount of brokerage between Consols and railway preference stock was argued; but that could scarcely have been overlooked when the question prominently before the Court was as to how much costs the company ought to bear. I think, therefore, that the decision is an authority upon the question I am now considering.

I therefore hold that an interim investment in the securities mentioned in this order is a proper one, and that the costs of making that investment must be paid by the respondents, the London County Council.

Solicitors: *Janson, Cobb, Pearson & Co.; W. A. Blaxland.*

(1) 59 L. J. (Ch.) 530. W. C. D.

JOYCE J.
1901
March 2.

In re HARRIS.
Ex parte LONDON COUNTY COUNCIL.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 79—*Compulsory Purchase of Land—Property held for Term to secure Annuity for Lives—Cesser of Term on dropping of last Life—Annuitant in Possession—Reversioner unknown—Investment of Purchase-money.*

By indenture dated September 1, 1810, A. H. covenanted to pay to S. H., his executors, administrators and assigns, during the lives of nine persons and the lives and life of the survivors and survivor of them, an annuity of 100*l.*, and for better securing the annuity A. H. demised certain premises to S. H. for the term of 200 years upon trust, in case default should be made in payment of the annuity, that S. H., his executors, administrators and assigns, should out of the rents and profits, or by selling, demising, or mortgaging the premises, raise sufficient to satisfy the annuity and suffer A. H., her heirs and assigns, to receive the residue of the rents and profits for their own use and benefit; provided that, after the termination of the annuity by the dropping of the last life, the trusts aforesaid should cease. Default was made in the payment of the annuity, and from 1829 to 1900 S. H. and his successors in title had been in continuous receipt of the rents of the premises, and the surplus over and above the amount of the annuity had been retained by the person for the time being entitled to the annuity without any claim on the part of any reversioner. The last life dropped on May 31, 1895. In 1900 the premises were compulsorily acquired by the London County Council, who paid the purchase-money into court. Upon a petition by the successor in title of S. H. for payment out, the Court declined to order the fund to be paid out, but directed it to be invested and the dividends to be paid to the petitioner until the lapse of twelve years from May 31, 1895, or further order.

PETITION.

By an indenture dated September 1, 1810, and made between Thomas Luxmore of the first part, Ann Harrison of the second part, and Samuel Harris of the third part, the said T. Luxmore and Ann Harrison covenanted to pay to S. Harris, his executors, administrators and assigns, during the lives of the nine persons therein named and the lives and life of the survivors and survivor of them, an annuity of 100*l.* by equal quarterly payments on the days therein mentioned, and for better securing the regular payment of such annuity Ann Harrison thereby demised the messuage and premises then known as No. 338,

JOYCE J. 1901 HARRIS, *In re.* LONDON COUNTY COUNCIL, *Ex parte.*

Strand, London, to S. Harris for the term of 200 years at the yearly rent of a peppercorn if demanded, but nevertheless upon the trusts and subject to the power thereinafter expressed and contained of and concerning the same, that was to say: upon trust to permit Ann Harrison, her heirs and assigns, to receive the rents and profits thereof until default should be made in payment of the said annuity, and upon further trust, in case any quarterly payment of the annuity or any part thereof should be unpaid for twenty-one days after any of the days thereby appointed for payment thereof, that then and so often S. Harris, his executors, administrators and assigns, should, out of the rents, issues, and profits of the said premises, or by selling, demising, leasing, or mortgaging the same for all or any part of the said term of 200 years, raise and levy such sum or sums as should be sufficient to pay and satisfy the annuity, or so much thereof as should from time to time be unpaid and the costs thereby incurred, and should apply such sum or sums in satisfaction thereof accordingly, and should pay to or otherwise permit and suffer Ann Harrison, her heirs and assigns, from time to time to receive and take the residue or overplus of the rents, issues, and profits of the said premises after full payment and satisfaction of the annuity and all arrears thereof and costs to and for her and their own use and benefit. Provided always that after the determination of the annuity by (inter alia) the death of the survivor of the nine persons therein mentioned and payment of all arrears thereof and all costs, the term of 200 years, or so much thereof as should be or remain undisposed of under the trusts aforesaid, should cease, subject and without prejudice to any sale, mortgage, or other disposition of the said premises under the trusts aforesaid.

Default was made in payment of the annuity, and from the year 1829 down to 1900 S. Harris and his successors in title had been in continuous receipt of the rents of the said premises. During the whole of that period the premises had been let at rents varying from 120*l.* to 150*l.* per annum, and the surplus over and above the amount of the annuity had been retained by the person for the time being entitled to the annuity, with-

out any claim or demand on the part of any reversioner or other person.

The survivor of the nine persons named in the deed died on May 31, 1895. In 1900 the London County Council under their compulsory powers acquired the said premises at a valuation of 8400*l.* and paid the purchase-money into court.

This was a petition for payment out presented by the surviving executor and trustee and tenant for life of the residuary personal estate under the will of S. T. Harris, a successor in title of S. Harris.

The petitioner asked (1.) that the 8400*l.* on deposit in court, together with any interest thereon, might be paid to her as trustee of the will of S. T. Harris; or (2.) alternatively, that the said sum of 8400*l.* might be invested, and that the interest thereon and the dividends as they accrued on such investments might until further order be paid to her as such trustee as aforesaid.

Younger, K.C., and *A. B. Marten*, for the petitioner. The petitioner and her predecessors in title have been in undisputed possession and in receipt of the rents of the premises ever since 1829 down to the time when the property was acquired by the London County Council. She is therefore a party "in possession of such lands as being the owner thereof, or in receipt of the rents of such lands as being entitled thereto at the time of such lands being purchased or taken"—Lands Clauses Consolidation Act, 1845, s. 79—and is to "be deemed to have been lawfully entitled to such lands until the contrary be shewn to the satisfaction of the Court." There has been no adverse claim to the property for nearly seventy-two years, and the petitioner is entitled to have the fund paid out to her: *Ex parte Chamberlain.* (1) But see *Gedye* v. *Commissioners of H.M.'s Works and Public Buildings* (2), where the correctness of the decision in that case was doubted by Lindley and Bowen L.JJ.

[JOYCE J. I do not think the petitioner is entitled to have the fund paid out to her at present.]

She is at any rate entitled to have the fund invested and the dividends paid to her.

(1) (1880) 14 Ch. D. 323. (2) [1891] 2 Ch. 630.

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F. Thompson, for the London County Council.

JOYCE J. I cannot order the corpus of the fund to be paid out to the petitioner, but I will make an order directing the investment of the fund in court and the payment of the dividends on such investments to her until the expiration of twelve years from the dropping of the last of the nine lives: that is, from May 31, 1895; or until further order. Costs according to the Act.

Solicitors for petitioner: *Warren, Murton & Miller, for F. F. Giraud, Faversham.*

Solicitor for London County Council: *W. A. Blaxland.*

G. A. S.

JOYCE J. 1901 *March* 7.

In re MARYON WILSON'S SETTLED ESTATES.

[1900 M. 2150.]

Settled Land—Application of Capital Money—Leasing Powers—Charges of Estate Agent for procuring Lease—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* 10.

The commission charged by an estate agent for procuring a lease of settled land for a tenant for life under the Settled Land Act, 1882, is payable out of capital money arising under the Act.

THIS was an application under the Settled Land Acts, 1882–1890, by the tenant for life of a settled estate in the course of development, known as the Charlton Estate, Kent, for an order that the trustees of the settlement might be authorized to pay (inter alia) certain charges by way of commission of Messrs. Farebrother, Ellis & Co., the agents of the estate, for letting various portions of the estate on building leases, and that these charges might be paid out of capital moneys in the hands of the trustees. It appeared from the evidence that the charges were proper and reasonable.

Hughes, K.C., and *Austen-Cartmell*, for the tenant for life, were stopped by the Court.

Hamilton, *K.C.*, and *Onslow*, for the trustees of the settlement. The question is whether these expenses come within sub-s. 10 of s. 21 of the Settled Land Act, 1882. (1) Three classes of leases are authorized by the Act—mining leases, building leases, and occupation leases. Primâ facie the words of the sub-section are sufficient to cover an occupation lease, and unless some limitation is put upon those words there is nothing to prevent a tenant for life from letting for successive periods of three years and charging the expenses on each occasion upon capital, although he would take the whole benefit. That would be a most unjust result. Some limitation ought to be placed upon sub-s. 10, and that limitation is to be found in the preceding sub-sections. All the specific cases referred to in these sub-sections are charges in respect of capital, and sub-s. 10 must be limited in the same way. The expenses of and incidental to the granting of a lease are by their nature payable out of income, except so far as they are payable by the lessee, and we say that there is nothing in the Act to authorize the payment of them out of capital.

Hughes, *K.C.*, in reply. The words of the sub-section are wide enough to include these expenses, and there is no ground for construing the sub-section with the previous sub-sections. No argument can be founded upon any supposed injustice arising from the construction for which I am contending. The leases authorized by the Act include a mining lease, and by s. 11, in the case of a mining lease, a tenant for life impeachable for waste is entitled to retain only one-fourth of the rent, yet, according to the view of the trustees, he would be liable to pay all the expenses of obtaining the lease. That would be an injustice to the tenant for life. The granting of leases

(1) Sect. 21: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

"(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act."

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under the Act is not solely for the benefit of the tenant for life, but is for the benefit of the estate.

JOYCE J. The exercise by a tenant for life under the Settled Land Act, 1882, of the power of leasing appears to be as much an exercise of the powers of the Act within the meaning of s. 21, sub-s. 10, as the exercise of the power of sale. I do not see any way out of the express words, and I must therefore, I suppose, hold that these charges are payable out of capital money arising under the Act.

Solicitors: *Bell, Steward, May & How.*

H. B. H.

JOYCE J. 1901 *Feb.* 12; *March* 14.

In re MOORE. PRIOR *v.* MOORE.

[1900 M. 2331.]

Will—Gift to maintain Tomb "for the Longest Period allowed by Law"—"Until Twenty-one Years from the Death of the last Survivor of all Persons who shall be Living at my Death"—Perpetuity—Uncertainty.

Testatrix bequeathed the sum of 500*l.* New Consols to trustees, upon trust to apply the dividends thereof in maintaining and keeping in repair the tomb of her brother in Africa "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—

Held, that the gift was void for uncertainty.

Whether it was void as a perpetuity, *quære.*

THE testatrix, Martha Mary Moore, by her will dated September 27, 1897, bequeathed the sum of 500*l.* New Consols (free of duty) to trustees, upon trust to apply the dividends thereof in such manner and through such agency or instrumentality as they should think fit in maintaining and keeping in a state of proper repair, condition, and protection the grave or tomb of her late brother George Murray Morgan, deceased, near that of the late Mrs. Livingstone, in the burial ground at Shupoinga, otherwise Chupanza, Zambesi, in Africa, "for the

longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death"; and, subject to the foregoing trust, the testatrix declared that the aforesaid sum of 500*l.* New Consols should form part of her residuary personal estate, and be held upon the trusts thereof.

This was a summons taken out by the plaintiffs, the trustees, for the determination, inter alia, of the question whether the above-mentioned bequest was valid and effectual.

Hughes, K.C., and *S. Dickinson*, for the trustees.

Younger, K.C., and *H. Fellows*, for persons interested in the residue. This is a perpetuity, and the gift is therefore invalid. The vagueness of the statement as to the persons during whose lives the trust is to last makes it a perpetuity, notwithstanding it is expressly stated that it is to be within the period allowed by law. It is impossible to ascertain when the last life will drop, and the period is, therefore, entirely indefinite. It is for an uncertain period and twenty-one years more. In *Thellusson* v. *Woodford* (1) Macdonald C.B. said, as to the number of lives during which an executory devise is permitted by the rules of law, that it might be for any number of lives the extinction of which could be proved without difficulty. And Lord Eldon L.C. said: "The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine when the survivor of them drops." The extinction of every life in this case could never be proved. The period is entirely indefinite, and at any rate the gift is void for uncertainty.

[JOYCE J. Cannot the words subsequent to the expression "the longest period allowed by law" be rejected?]

No, because they constitute the testatrix's interpretation of what she means. It would be more proper to strike out the previous words. The testatrix has given a definition of what she means, which must be substituted for the expression "the longest period allowed by law."

(1) (1805) 11 Ves. 112, 146; 8 R. R. 104.

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[They also referred to *Pirbright* v. *Salwey* (1); *In re Dean* (2); *Pownall* v. *Graham.* (3)]

Hamilton, K.C., and *T. T. Methold*, for a party in the same interest.

[JOYCE J. referred to *In re Viscount Exmouth.* (4)]

S. Dickinson, in reply. The gift is not void for perpetuity, nor on the ground of uncertainty. The law was not settled by *Thellusson* v. *Woodford.* (5) It was not settled until *Cadell* v. *Palmer* (6), where it was laid down that "The rule will be that a limitation will not be too remote, if the vesting be suspended for twenty-one years beyond a life or lives in being." It has never been held that the lives named may be too numerous. *Pownall* v. *Graham* (3) shews that the gift is not void for uncertainty.

JOYCE J. I think this gift is void for uncertainty. It is impossible to ascertain when the last life will be extinguished, and it is, therefore, impossible to say when the period of twenty-one years will commence. Under these circumstances it is not, I think, necessary for me to consider whether the gift is void as transgressing the rule against perpetuity.

Solicitors: *Tamplin, Tayler & Joseph; Evans, Foster & Wadham; Johnson & Master.*

(1) W. N. (1896) 86.
(2) (1889) 41 Ch. D. 552, 557.
(3) (1863) 33 Beav. 242.
(4) (1883) 23 Ch. D. 158.
(5) 11 Ves. 112; 8 R. R. 104.
(6) (1833) 1 Cl. & F. 372, 423; 36 R. R. 128.

G. A. S.

JOYCE J.
1901
March 5, 15.

In re SANFORD.
SANFORD *v.* SANFORD.

[1901 S. 157.]

Will—Construction—Absolute Gift or Estate for Life with Power of Appointment.

Testator by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, and also gave them certain personal estate. He gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his sons executors on her death. By a codicil, dated in 1898, he revoked his will and gave all his property to his wife, "so that she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed" the whole or any part of his said property, then he declared that his said will should take effect as if his codicil had not been made; and he appointed his wife executrix of his codicil during her life:—

Held, that the wife took an estate for life only with a general power of appointment.

THE testator, the Rev. Edward Ayshford Sanford, by his will dated April 30, 1894, devised certain real estate to the use of his eldest son Eugene Ayshford Sanford during his life, with remainder to the use of his first and other sons successively according to seniority in tail general with remainders over; and the testator devised certain other real estate to the use of his second son Edward Charles Percival Sanford, with remainder to his first and other sons successively according to seniority in tail general with remainders over. The testator also gave certain personal estate to his sons E. A. Sanford and E. C. P. Sanford, and gave the residue of his real and personal estate to his wife Christina Emma Sanford absolutely. The testator appointed his said wife the executrix of his will during her life, and his said two sons executors on her death.

By a codicil to his will, dated January 14, 1898, the testator declared as follows:—

"Whereas various circumstances have occurred affecting my

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property devised and appointed in and by my said will, I deem it advisable to revoke it, and hereby do revoke it, and do bequeath, devise, and appoint to my dearest wife Christina Emma Sanford in the event of her surviving me all my property of whatsoever kind, whether real or personal or in possession, reversion, remainder, or expectancy, for, to, or over which I may be at my death seised or entitled or have any power of disposal, so that my said wife C. E. Sanford may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper. In the event, however, of my said wife C. E. Sanford not surviving me or dying without having devised or appointed the whole or any part of my said property, then my said will dated the 30th day of April, 1894, shall take effect as if this my said codicil had not been made, and I hereby appoint my said wife C. E. Sanford during her life executrix of this codicil."

The testator died on November 14, 1899. His widow C. E. Sanford died on July 17, 1900, having by her will dated October 28, 1864, devised and bequeathed all her property to the testator absolutely.

E. A. Sanford and E. C. P. Sanford were the only children of the marriage of the testator and Christina E. Sanford.

By a settlement executed in 1882 upon his marriage, E. A. Sanford covenanted with the trustees thereof that if he should become possessed from any one source of property to the value of 500*l.* he would convey the same to the trustees to be held upon the trusts of the said settlement.

This was a summons taken out by the next friend of G. A. Sanford (an infant), the eldest son of E. A. Sanford, for the determination of the question whether, upon the true construction of the will and codicil of the testator, his widow C. E. Sanford was at his death entitled to his real and personal estate absolutely, or only to a life estate therein with a general power of appointment over the same.

The defendants to the summons were E. A. Sanford, E. C. P. Sanford, and the trustees of E. A. Sanford's marriage settlement.

Hughes, K.C., and *J. T. Prior*, for the plaintiff. Upon the codicil it is plain that the testator only intended to give his wife a life estate with a power of disposition by way of control: *In re Stringer's Estate* (1); *In re Lowman.* (2)

Badcock, K.C., and *T. T. Methold*, for E. A. Sanford, supported the same contention.

Younger, K.C., and *A. Adams*, for E. C. P. Sanford. There is here an absolute gift to the wife, followed by an inconsistent gift over which is repugnant and void. In the absence of clear words the absolute gift cannot be cut down: *In re Mortlock's Trust* (3); *In re Jones* (4); *In re Yalden.* (5)

R. J. Parker and *G. R. Northcote*, for the trustees of E. A. Sanford's settlement.

Hughes, K.C., in reply, referred to *In re Pounder* (6) and *Borton* v. *Borton.* (7)

March 15. JOYCE J. In reference to the question which arises in this case, there are a multitude of decisions upon similar or analogous testamentary instruments, but none upon a disposition couched in precisely the same terms as those which we have here to consider.

It has been said by the Court of Appeal (8) that the true way to construe a will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given. I proceed, therefore, to examine the language of the codicil which we have to construe.

By his will the testator had given, devised, and bequeathed all his real and personal estate not thereby otherwise disposed of unto his wife, Christina Emma Sanford, for her absolute use and benefit, subject to the payment of his debts, funeral and testamentary expenses, and legacies. By the codicil in question, after reciting that circumstances having occurred affecting his property devised and appointed by his will, he

(1) (1877) 6 Ch. D. 1, 18.
(2) [1895] 2 Ch. 348.
(3) (1857) 3 K. & J. 456.
(4) [1898] 1 Ch. 438.
(5) (1851) 1 D. M. & G. 53.
(6) (1886) 56 L. J. (Ch.) 113.
(7) (1849) 16 Sim. 552.
(8) *In re Blantern*, W. N. (1891) 54.

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deemed it advisable to revoke it, he did thereby revoke the same, and he bequeathed, devised, and appointed to the same lady, in the event of her surviving him, all his property of whatsoever kind, whether real or personal, or in possession, reversion, remainder, or expectancy, for, to, or over which he might be at his death seised or entitled or have any power of disposal.

Now, pausing here for a moment, it is to be observed that there are no words of limitation in this gift to the wife. It is wholly indefinite. There is no expression of any intention that she should take absolutely or for her own use and benefit; nor, on the other hand, are there any words limiting the gift to a life interest or otherwise. It cannot be doubted, however, that if the codicil had now gone on to dispose of the property after the death of the testator's wife, or to prescribe in any manner how it was to go upon her decease, she would have taken only a life interest under the words which I have read: *Re Russell.* (1) Moreover (having regard to s. 28 of the Wills Act), these words do not pass more than a life estate in the realty comprised in the gift if a contrary intention appear anywhere in the codicil. I am by no means certain that such a contrary intention does not appear.

The codicil then proceeds: "So that my said wife C. E. Sanford may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." By these words the testator (it is not a lawyer's will) appears to me to limit and define the precise character of the gift which he is making, and which as yet was indefinite. He says that she is to have, not the absolute property, but full possession (involving, I suppose, use and enjoyment of the income) and entire power and control over it, and so on, adding: "In the event, however . . . ." [His Lordship read the remainder of the codicil, and continued:—]

The alternative results between which I have to choose are (1.) an absolute gift of the property on the one hand, and on the other (2.) the gift of a life estate with a power of appointment. In making the selection it is not, I think, immaterial

(1) (1885) 52 L. T. 559.

to consider that the testator, in the clause under consideration, expressly makes use of the word "power," and speaks of his wife dying without having "devised or appointed," directing in effect that the property not devised or appointed by her is to go as under the will he had previously made.

If by the codicil in question the testator meant his wife to take absolutely, there was no use in his providing expressly for her having the possession or the power and control. The reference to a power to deal with the property shews, I think, that the testator did not intend her to have such an estate or ownership as would enable her to dispose of the subject-matter without the assistance of that power. Then by the later words he treats the former as having conferred upon her a power of appointment. If the Court were to construe this to be an absolute gift to the wife, the clause "so that my said wife may have full possession," and so on, would be rendered ineffective, and what follows void and inoperative. The rule is to construe a will ut res magis valeat quam pereat, and to give effect so far as possible to all the words used by the testator. If this codicil be so construed as to give to the wife a limited interest with a power of appointment, and to give over that which she did not appoint, every word is rendered operative. There is not here the difficulty which there was in *Constable* v. *Bull* (1), because the ultimate disposition of what the wife may not have devised or appointed is completely explained by the fact that the testator considered what he had given to her was a power of appointment. This part of my judgment has been taken almost verbatim from a passage in the judgment of Kay J. in *In re Pounder*. (2)

Upon the whole I come to the conclusion, from a consideration merely of the words which the testator has used, that this case falls rather within the class of cases in which the donee takes a life estate with a power of appointment, than within the class in which the devisee or legatee is held to take the property absolutely with a further gift upon her death, which the law holds to be inoperative and void. The adoption of the construction which I prefer has the not

(1) (1849) 3 De G. & Sm. 411. (2) 56 L. J. (Ch.) 113.

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unimportant merit of effectuating the obvious and expressed intention of the testator, and if the terms of the codicil be ambiguous—I do not think they really are—there is not wanting authority to shew that in a case of obscurity or ambiguity, even when the question is one of invalidity on the ground of remoteness, repugnancy, or the like, weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention: see per Lord Selborne in *Pearks* v. *Moseley* (1) and per Lord Kingsdown in *Towns* v. *Wentworth.* (2)

I decline, therefore, unless compelled, to adopt the opposite construction, and I do not think that there is any expression in the codicil, or that any authority has been cited, which compels me to do so. The case of *In re Jones* (3), which was strongly insisted upon in argument, was, in my opinion, very different. There the property was given to the donee expressly for her absolute use and benefit, this gift being followed by an attempted disposition of what might be left not sold or disposed of.

The result, therefore—if I am right—is that in the present case, Mrs. Sanford having died without making any effectual appointment of the property in question, it passed upon her decease as under the will of her husband; and this, accordingly, is what I propose to declare.

Solicitors: *Lethbridge & Prior; W. M. Sturges; Hollams, Sons, Coward & Hawksley.*

(1) (1880) 5 App. Cas. 714, 719. (2) (1858) 11 Moo. P. C. 526, 543.
(3) [1898] 1 Ch. 438.

G. A. S.

In re ETHEL AND MITCHELLS AND BUTLERS' CONTRACT.

JOYCE J.
1901
March 13, 14, 25.

[1901 E. 42.]

Conveyance—Construction—Words of Limitation—Habendum to Grantee "in Fee"—Supplying Omission from Context—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 51.

Under s. 51 of the Conveyancing and Law of Property Act, 1881, in a deed, in order to pass the legal estate in fee simple, it is necessary, in the absence of the word "heirs," to use the actual words of limitation mentioned in the section, namely, in fee simple.

Therefore, where after the passing of the Act, freehold land, upon payment off of a mortgage thereon, was expressed to be reconveyed to the mortgagor to hold the same unto and to the use of the mortgagor in fee freed from the mortgage:—

Held, that (apart from any question of rectification) the word "simple" could not consistently with the Act be supplied by construction from the context, and that the legal estate in the fee simple did not pass.

THIS was a purchaser's summons under the Vendor and Purchaser Act, 1874.

On October 5, 1900, the respondent entered into an open contract for the sale of certain freehold premises, Nos. 78 and 79, Springfield Street, Birmingham.

Upon the investigation of the title, it appeared that Thomas Manton, a predecessor in title of the vendor, had mortgaged the property for 280*l.*, and that upon payment off of the mortgage debt he had taken what purported to be a reconveyance of the property. The deed of reconveyance was dated December 12, 1895, and, after reciting the mortgage deed and that the principal sum only then remained due, it was witnessed that the mortgagees as mortgagees thereby conveyed "unto Thomas Manton" the mortgaged premises "to hold the same unto and to the use of the said Thomas Manton in fee" freed and discharged from the mortgage debt. The purchasers by their third requisition to title took the objection that the correct words of limitation were not used in the habendum to the reconveyance, and required the vendor to get in the legal estate in the reversion. The vendor insisted that the legal estate

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passed by the deed of reconveyance, and declined to comply with this requisition. Ultimately this summons was taken out by the purchasers for a declaration that the requisition had not been sufficiently answered, and that a good title to the property had not been shewn.

Younger, K.C., and *E. P. Hewitt*, for the purchasers. The third requisition has not been sufficiently answered, and no good title is shewn to the property.

Before the passing of the Conveyancing Act, 1881, the only way to pass the legal estate in the fee simple by deed was by a grant to A. and his heirs, and since the Act there must be a grant either to A. and his heirs as before, or to A. "in fee simple." For the purpose of limitation of the estate words cannot be supplied. The only way in which s. 51 of the Act can be made use of is by using its exact terms. In the absence of that the case must be treated as if the section had never been passed: Williams on Real Property, 16th ed. pp. 170, 171.

[JOYCE J. The question is whether the word "simple" has been accidentally omitted.]

That may be a good ground for rectification, but it does not affect the validity of the deed to pass the legal estate. *In re Whiston's Settlement* (1) is the nearest authority. All the text-writers take the same view with reference to s. 51. That is an express statutory enactment which defines the words necessary to pass the legal estate. If those words are not used, no assistance can be got from the section. It would be running counter to the statute to hold otherwise. The question of intention cannot enter into a case of this sort. If words are to be added, the question of intention at once arises. Unless the intention is expressed in terms of art appropriate to pass the legal estate, an estate for life only is conveyed: Tudor's Leading Cases on Real Property, 3rd ed. p. 716; Elphinstone on the Interpretation of Deeds, p. 240.

Before the Act you could not have inserted the word "heirs," and since the Act you cannot insert the word "simple."

(1) [1894] 1 Ch. 661.

Hughes, K.C., and *S. B. L. Druce*, for the vendors. This is a reconveyance, and the intention to pass the legal estate is apparent on the face of the deed. The section was intended to get rid of a technicality, and it cannot fairly be construed as suggested. If so, a mere misspelling of the words would be fatal to the passing of the legal estate.

[JOYCE J. The question is whether the word "simple" can be supplied by way of construction.]

We submit that it can. In a deed as well as in a will a word may be supplied by construction if the intention of the parties sufficiently appears from the context: Sugden's Law of Property, p. 92; Elphinstone on the Interpretation of Deeds, pp. 78–80; *Wight* v. *Dicksons* (1); *Trethewy* v. *Ellesdon* (2); *Coles* v. *Hulme* (3); *Lord Say and Seale* v. *Lloyd* (4); *Bustard* v. *Coulter* (5); *Butler* v. *Dodton* (6): *Wall* v. *Wright* (7); *In re Daniel's Settlement Trusts* (8); *Doe* v. *Smeddle* (9); *In re Smith's Estate* (10); *Flight* v. *Lord Lake*. (11) The last cited case is very like this. There, as here, there was the omission of a word in a document required by statute to be in a particular form, and the Court held that the word ought to be supplied; but here the omission is less important than in that case, because the word "fee" is constantly used both by laymen and by lawyers as equivalent to fee simple.

Even if the word "simple" cannot be inserted, the words "in fee" cannot be read as meaningless, and, there being no doubt as to the intention, the Court will attribute to those words the meaning of "fee simple." The Conveyancing Act, 1881, does not say that the words "fee simple" shall be used as a substitute for "heirs." It merely says that it shall be sufficient to use those words. It does not say that no other words will be effective.

E. P. Hewitt, in reply, cited Co. Litt. pp. 1 a, 8 b; Shep.

(1) (1813) 1 Dow, 141.
(2) (1690) 2 Vent. 141.
(3) (1828) 8 B. & C. 568; 32 R. R. 486.
(4) (1712) 4 Bro. P. C. 73.
(5) (1601) Cro. Eliz. 902, 917.
(6) (1580) Cary, 122–3.
(7) (1837) 1 D. & Wal. 1.
(8) (1875) 1 Ch. D. 375.
(9) (1818) 2 B. & Al. 126; 20 R. R. 377.
(10) (1891) 27 L. R. Ir. 121.
(11) (1835) 2 Bing. N. C. 72.

JOYCE J. 1901

ETHEL AND MITCHELLS AND BUTLERS' CONTRACT. *In re.*

Touchstone, p. 106; *Holliday* v. *Overton* (1); *Lucas* v. *Brandreth* (2); *Tatham* v. *Vernon* (3); *Meyler* v. *Meyler*. (4)

Cur. adv. vult.

March 25. JOYCE J. In this case the respondent was ill-advised or unfortunate enough to enter into what is known as an open contract for sale of certain freehold properties in Springfield Street, Birmingham. In due course the title came to be investigated, when it was found that upon the payment off of a mortgage on the property in the year 1895 (after the Conveyancing Act of 1881) the reconveyance was by a conveyance to the mortgagor, a former owner, habendum "unto and to the use of" the mortgagor—not "in fee simple," but "in fee," freed and discharged from the mortgage; and it is now objected on behalf of the purchasers that the effect of this reconveyance was, under the circumstances, to pass only an estate for life to the mortgagor, and to leave the legal estate in the remainder or reversion upon such life estate outstanding in the mortgagees. To my mind, it is perfectly plain upon a mere perusal of this reconveyance that the deed was framed as it is by accident, or through inadvertence, ignorance, or carelessness, and that if necessary the vendor is entitled, as a matter of course, to have the reconveyance rectified or to a vesting order with respect to the before-mentioned legal estate. This could probably be obtained for less than a quarter of the costs incurred in the present proceeding, which is a summons under the Vendor and Purchaser Act by the purchasers to have it declared that their requisition with respect to the before-mentioned legal estate in the remainder or reversion has not been sufficiently answered, or a good title shewn. During the argument it occurred to me, and I suggested, whether upon a reference to the authorities collected in Elphinstone on the Interpretation of Deeds, pp. 78–80, it might not be possible to make out that the word "simple" after the word "fee" could and ought to be supplied by construction, and

(1) (1852) 14 Beav. 467.
(2) (1860) 28 Beav. 274.
(3) (1861) 29 Beav. 604.
(4) (1883) 11 L. R. Ir. 522.

that the reconveyance should thus be made to read as a conveyance "in fee simple," especially as there is not wanting some authority for the proposition that where fee is mentioned it shall be intended fee simple (11 Rep. 39 a). Upon further consideration, however, I regret to say that I do not think this can be done. There cannot be any doubt about the intention of the parties with respect to the effect of the reconveyance in question, but it does not appear to me that I can come to the conclusion that the word "simple" was intended to have been inserted, but has been omitted in the copying or by some similar accident, even if that would suffice. I cannot find that the parties when they executed the reconveyance did not really know and intend the deed to be drawn and to stand in the precise terms in which it is now found to be, although there cannot be the slightest doubt as to what they intended to be its operation and effect. Before the Conveyancing Act of 1881, however plain the intention might be as to the effect of a conveyance of freeholds, the deed could not operate as a grant of the legal estate in fee simple without the word "heirs." Now s. 51 of the Conveyancing Act, 1881, provides, "In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs"; and I think that in the absence of the word "heirs," however plain the intention of the parties may be to pass the legal estate in fee simple, this absence can only be compensated for by the actual insertion and use of the words "fee simple," and, notwithstanding the decision in *Flight* v. *Lord Lake* (1), I am compelled to hold that to supply the word "simple" by construction from a consideration of the obvious intention as expressed in other parts of the instrument itself would not be a compliance with the terms of the Act. The result, therefore, is that the purchasers are entitled to succeed upon their summons.

Solicitors: *Preston, Stow & Preston, for A. Pointon, Birmingham; Gamlen, Burdett & Gamlen, for Cottrell & Son, Birmingham.*

(1) 2 Bing. N. C. 72.

H. B. H.

WRIGHT J.
1901
March 27.

In re NATIONAL UNITED INVESTMENT CORPORATION.

Company—Winding-up—Secured Creditor—Garnishee Order—Application of Law of Bankruptcy—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

Sect. 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under attachments of debts, is not made applicable by s. 10 of the Judicature Act, 1875, to the winding-up of insolvent companies, and therefore it is still the law, as recognised in *In re Stanhope Silkstone Collieries Co.*, (1879) 11 Ch. D. 160, that a judgment creditor who has obtained a garnishee order nisi to attach a debt owing by a company to his debtor, and has served the order on the company before the commencement of its winding-up, is a secured creditor and entitled to the debt as against the liquidator.

THE Old Bushmills Distillery, Limited, obtained judgment against the National United Investment Corporation, Limited, for a debt. One Seddon had guaranteed the debt, and he obtained an assignment of it from the Old Bushmills Distillery.

As the result of certain monetary transactions, to which Commerce, Limited, and the Alkalite Syndicate were parties, the syndicate held certain funds the balance of which it was to hand to one Walker, the managing director of the National United Investment Corporation.

Seddon obtained a garnishee order nisi attaching this debt, and served it on the garnishee.

After this service a petition was presented asking that the National United Investment Corporation should be wound up, and on this petition a winding-up order was made. The debt owing to the corporation had not been paid, nor had the garnishee order been made absolute.

The liquidator of the corporation on a summons for directions sought to obtain a decision of the Court that Seddon was not a secured creditor, so as to be able to take the balance owing to the corporation.

Austen-Cartmell, for the liquidator of the corporation. The question is whether a creditor of a company who has obtained

and served a garnishee order nisi, attaching a debt owing to the company by another person, before a winding-up order has been made against the company, obtains a charge on the debt and therefore becomes a secured creditor.

Sect. 10 of the Judicature Act, 1875, provides that in the administration by the Court of the assets of a deceased insolvent person, "and in the winding-up of any company . . . . whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy. . . ."

Under s. 12 of the Bankruptcy Act, 1869, the security of a creditor was not affected by his debtor's bankruptcy; but a garnishee order nisi did not make the garnishee a secured creditor unless he had served the order on the person whose debt was attached before the bankruptcy of that person: *In re Stanhope Silkstone Collieries Co.* (1) Nevertheless, in that case the bankruptcy rule as to the effect of obtaining a garnishee order was held to be applied by s. 10 of the Judicature Act, 1875, to the winding-up of insolvent companies, and the decision has been recognised as law since the passing of the Bankruptcy Act, 1883: *Croshaw* v. *Lyndhurst Ship Co.* (2) But that section applies the bankruptcy law for the time being in force, and that law has been altered by s. 45 of the Bankruptcy Act, 1883, which provides that "Where a creditor . . . . has attached any debt due to him, he shall not be entitled to retain the benefit of the . . . . attachment against the trustee in bankruptcy of the debtor, unless he has completed the . . . . attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy" by him; and for the purposes of the Act "an attachment of a debt is completed by receipt of the debt."

Although a winding-up order has been made against the

(1) 11 Ch. D. 160. (2) [1897] 2 Ch. 154, 161.

WRIGHT J. 1901 NATIONAL UNITED INVESTMENT CORPORATION, *In re.*

corporation, the debt has never been received. The words "receipt of the debt" are strictly construed, and even payment into court at the instance of a third party intervening will not complete the attachment although the claim of the third party is afterwards withdrawn: *Butler* v. *Wearing*. (1) Even a payment made on a day after the receiving order, in pursuance of an arrangement made before the order to pay on that day, is not sufficient: *Ex parte Ealing Local Board*. (2)

J. Brooke Little, for Seddon. *In re Stanhope Silkstone Collieries Co.* (3) is an authority in my favour, for it shews that the service of the garnishee order nisi makes the creditor serving it a secured creditor. The law there laid down has not been altered. Even when the Bankruptcy Act, 1869, was in force all its provisions were not applied by s. 10 of the Act of 1875 to the winding-up of companies, and the Court of Appeal held that because a security was avoided in bankruptcy it was not necessarily avoided in winding-up by virtue of the Act of 1875, and that s. 87 of the Bankruptcy Act, 1869, as to an execution creditor being deprived of the benefit of his execution in a certain event, was not imported into winding-up: *In re Withernsea Brickworks*. (4)

But there are decisions since the Act of 1883 which are in my favour. Sect. 10 of the Judicature Act, 1875, applies the bankruptcy rules referred to not only to the winding-up of companies, but also to the administration of the estates of deceased insolvent persons, and s. 45 of the Bankruptcy Act applies not only to attachments of debts, but also to executions, in which case the title of the trustee in bankruptcy prevails unless an execution against goods is completed by seizure and sale. Yet the Court of Appeal has held that an administration order under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order, for the purposes of s. 45 of that Act, so as to disentitle an execution creditor to retain the benefit of an execution which has not been completed at the date of the administration order: *Hasluck* v. *Clark*. (5) And Chitty J.

(1) (1885) 17 Q. B. D. 182.
(2) (1890) 60 L. J. (Q.B.) 50.
(3) 11 Ch. D. 160.
(4) (1880) 16 Ch. D. 337.
(5) [1899] 1 Q. B. 699.

held that s. 10 of the Act of 1875 did not make s. 45 of the Act of 1883 applicable in the administration of an insolvent estate in the Chancery Division so as to restrict the right to sell under a sequestration: *Pratt* v. *Inman*. (1)

L. Ryland, for the Alkalite Syndicate.

Percy Wheeler, for the liquidator of Commerce, Limited.

Austen-Cartmell, in reply.

WRIGHT J. I will deal hypothetically with the only question which has so far been argued, but I cannot by so doing decide absolutely whether, assuming that Seddon has completely garnished the fund, he is entitled to it as against everyone else. Under the law as it existed prior to the passing of the Bankruptcy Act, 1883, a garnishee order nisi if served on the garnishee bound the fund and gave the garnisher the position of a secured creditor. Then came s. 45 of the Act of 1883, which, if it applies in the winding-up of a company, clearly shews that service of the order nisi does not now make the garnisher a secured creditor. This is the view of the section taken by the Court of Appeal in *Ex parte Ealing Local Board*. (2) Then is s. 45 of the Bankruptcy Act, 1883, attracted to winding-up proceedings by s. 10 of the Judicature Act, 1875? That section, it is true, applies to the winding-up of insolvent companies the rules "as to the respective rights of secured and unsecured creditors . . . . in force for the time being under the law of bankruptcy." But that section, when using the words "respective rights of secured and unsecured creditors," refers to the rights of secured and unsecured creditors, inter se, and does not affect the rights of those who are already secured. In *In re Withernsea Brickworks* (3) it was held by the Court of Appeal that the now repealed s. 87 of the Bankruptcy Act, 1869, depriving execution creditors of the fruits of execution where the sheriff had notice of a bankruptcy within fourteen days after sale, was not attracted to the winding-up of companies by s. 10 of the Judicature Act. In *Hasluck* v. *Clark* (4) the Court of Appeal held that s. 45 of the

(1) (1889) 43 Ch. D. 175.
(2) 60 L. J. (Q.B.) 50.
(3) 16 Ch. D. 337.
(4) [1899] 1 Q. B. 699.

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Act of 1883 was not applied by the Act of 1875 in the administration of a deceased debtor's estate under s. 125 of the Act of 1883, so as to disentitle an execution creditor to the benefit of an uncompleted execution. The same principle governs both cases, and also *Pratt* v. *Inman* (1), where Chitty J. held that s. 45 of the Act of 1883 was not applied by s. 10 of the Act of 1875 to the administration of insolvent estates in Chancery. The language of s. 45 of the Bankruptcy Act, 1883, seems to raise greater difficulties in the way of applying it to winding up than did the section of the Bankruptcy Act, 1869, for which it was substituted, because there seems to be nothing in the winding-up of a company which is equivalent to "the commission of any available act of bankruptcy" in the case of an individual debtor.

In my judgment, the principle of *In re Stanhope Silkstone Collieries Co.* (2) survives, notwithstanding s. 45 of the Bankruptcy Act, 1883, and the contention of the liquidator of the National United Investment Corporation, that the garnisher is not as against him a secured creditor, cannot prevail.

Solicitors for liquidator of the National United Investment Corporation: *Pritchard, Englefield & Co., for Southam & Glanley, Manchester.*

Solicitor for Seddon: *T. M. Richards, for Watson & Booth, Manchester.*

Solicitors for other parties: *Belfrage & Co., for Reece & Harris, Birmingham; Jaques & Co., for Layton, Melly & Layton, Liverpool.*

(1) 43 Ch. D. 175. (2) 11 Ch. D. 160.

F. E.

END OF VOL. I.

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A direction in a will to apply a yearly sum out of the rents of leaseholds, held for a term of more than twenty-one years from the testator's death, in effecting and keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, is not a direction to accumulate and does not fall within the Thellusson Act. *In re* GARDINER. GARDINER *v.* SMITH - - **Buckley J. 697**

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ADMINISTRATION — *Administrator — Attorney —Distribution of Assets.*

Letters of administration of the estate of a person who died in England were granted to the attorney of the widow, a resident in America, who was not legal personal representative of the deceased in any country:—

Held, that the principal could not give a discharge to the attorney, and the attorney was responsible for the due distribution of the assets. *In re* RENDELL. WOOD *v.* RENDELL
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2. —— *Priorities — Insolvent Estate — Creditors—Voluntary Debt—Bankruptcy Rule—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40, *sub-s.* 4.

The effect of s. 10 of the Judicature Act, 1875, is to introduce into the administration of the estates of deceased insolvents by the Chancery Division the rule in bankruptcy that voluntary

ADMINISTRATION—*continued.*
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Decision of Cozens-Hardy J., [1900] 2 Ch. 676, affirmed.

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The insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in court to the credit of another suit. The fund was transferred to the credit of the administration suit, and outstanding costs paid out of it:—

Held, that the present administrator of the deceased, a creditor, had no right of retainer against the balance in court. PULMAN *v.* MEADOWS - - - Cozens-Hardy J. 233

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By an agreement in writing the defendant agreed to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter-day:—

Held, that this was not a tenancy from year to year, but a licence revocable at will on reasonable notice, and that a quarter's notice terminating at the end of a year of the currency of the agreement was a reasonable notice. WILSON *v.* TAVENER - - Joyce J. 578

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ANNUITY—*Duration—Will—Annuity to Wife "so long as she remains unmarried"—Death of Wife unmarried.*

A testator directed his executor to set aside 200*l.* and thereout pay the testator's wife 3*l.* monthly so long as she remained unmarried, or until the 200*l.* became exhausted, the said payment of 3*l.* monthly to cease on the wife marrying again.

The wife died unmarried before the 200*l.* was exhausted:—

Held, that her executrix was entitled to the balance.

Rishton v. *Cobb*, (1839) 5 My. & Cr. 145, 152; 48 R. R. 256, followed. *In re* HOWARD. TAYLOR *v.* HOWARD - - Farwell J. 412

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In an action against executors and trustees to recover the plaintiff's share of the testator's residuary estate, the master had by his certificate found that the defendants had received personal estate of the testator not specifically bequeathed to a certain amount, and had paid, or were entitled to be allowed in account, certain other sums, leaving a balance due from them, one-fourth of which was due to the plaintiff. The certificate was based upon, inter alia, an affidavit of the defendants, in which they set forth a full account of the testator's personal estate which had come to their hands or the hands of either of them, or to the hands of any person or persons by their order or the order of either of them, or for their use or the use of either of them. The account contained particulars of their receipts, including various sums of cash.

The defendants having failed to comply with an order to pay into court the amount found to be due from them to the plaintiff, a motion for attachment was made against them:—

Held, that there was no evidence of actual receipt by the defendants, and that consequently the money was not shewn to be "in their possession or under their control" within the exception to s. 4 of the Debtors Act, 1869; and no order made on the motion. *In re* FEWSTER. HERDMAN *v.* FEWSTER - - - Joyce J. 447

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BANKER—*Closing Account—Banker and Customer — Mortgage to secure Account Current — Power of Sale—Notice by Mortgagor to Bank of Appointment of a Trustee for his Creditors.*

A customer of a bank mortgaged to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (among other events) default should be made in payment of the balance owing for the space of one calendar month after the account current had been closed.

On November 9, 1899, the customer wrote to the bank manager: "There was a meeting of creditors yesterday . . . . They agreed to accept all the assets I had. I gave them to understand that I was insured . . . . and that you held the policy . . . . as security for your account . . . . There was a trustee appointed. Trusting every one will get 20*s.* in the pound," &c.

On December 18 the bank sold the policy under the power in the mortgage:—

Held, that the letter amounted to a closing of the account, and that the bank were justified in realizing their security. BERRY *v.* HALIFAX COMMERCIAL BANKING COMPANY Kekewich J. 188

BANKRUPTCY—*Forfeiture on Alienation—Life Estate—"Vest in some other Person"—Act of Bankruptcy—Adjudication—Date of Vesting—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44, 54.

Where a person entitled to the receipt of dividends until he shall do or suffer to be done any act whereby the same if payable to himself would become vested in some other person, commits an act of bankruptcy which is followed by adjudication, the date upon which the dividends vest in the trustee in his bankruptcy, and are therefore forfeited, is, under the doctrine of relation back, the date of the act of bankruptcy, not the date of the adjudication. MONTEFIORE *v.* GUEDALLA - - - - Buckley J. 435

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BONA VACANTIA—Escheat—Death of testator without heirs—Sale under Settled Land Acts - - - - - 15
See CROWN.

BOOKS—Accounts—Right of partner to inspection by agent - - - 724
See PARTNERSHIP. 1.

BORROWING—Agent—Power of attorney—Excess of authority—Money had and received - - - - 261
See PRINCIPAL AND AGENT. 3.

BORROWING MEMBER—Infant—Mortgage for advances — Repudiation on attaining twenty-one - - - - 88
See BUILDING SOCIETY. 1.

BROKERAGE — Costs — Interim investment — Railway stock - - - 923
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BUILDING—Light—Derogation from grant—Implication—Reasonableness—Plan shewing building line - - - 834
See EASEMENT.

BUILDING ESTATE—Alienation of, with notice of contract—Rescission of contract by purchaser—Lien for deposit - 911
See VENDOR AND PURCHASER. 3.

BUILDING SOCIETY—*Infant Borrowing Member—Mortgage for Advances—Repudiation on attaining Twenty-one—Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 14, 21, 38.

The Building Societies Act, 1874, s. 13, empowers building societies registered under the Act to make advances to its members by way of mortgage; s. 21 makes the rules of the society binding on all the members; and s. 38 enacts that any person under the age of twenty-one may be admitted a member of the society, unless such admission is prohibited by the rules, and may give "all necessary acquittances."

In 1898 T., a member of a building society registered under the Building Societies Act, 1874, and whose rules enabled infants to become members, obtained advances to enable her to purchase some land and to complete some houses thereon. The transaction was carried out by a conveyance of the land to T., and a mortgage of it by T. to the society in the usual form as security for the advances made and to be made to her. At this time T. was a minor, but this was not known to the society. In 1899 T. attained her majority, and shortly afterwards brought an action against the society to set aside the mortgage as void under the Infants Relief Act, 1874. The society contended (1.) that by virtue of the provisions of the Building Societies Act, 1874, and their rules, the mortgage was valid; and (2.) that in any event T. could not retain the property and at the same time repudiate the charge created by the mortgage:—

Held, without deciding the first question, that the purchase and mortgage were one transaction, and that under the circumstances T. could not retain the property free from the charge upon it for the advances made by the society, including the costs of the action.

Quære, whether an infant borrowing member of a building society registered under the Building Societies Act, 1874, and whose rules enable infants to become members, can execute a valid mortgage to the society for advances. THURSTON *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY - - - - Joyce J. 88

2. —— *Unincorporated Society certified after* 1862 *and before* 1874—*Repeal of Statute under which Certified—Illegal Company—Jurisdiction to Wind up—Building Societies Act*, 1836 (6 & 7 *Will.* 4, *c.* 32)—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 4, 199—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 40—*Building Societies Act*, 1894 (57 & 58 *Vict. c.* 47), *s.* 25.

A building society was established and certified in 1868 under the Building Societies Act, 1836, but was never incorporated. By s. 25 of the Building Societies Act, 1894, the Act of 1836 was repealed as from August, 1896, as to all societies certified under it after 1856.

Early in 1900 the society was found to be insolvent, and a winding-up petition was then presented against the society, but C., one of its creditors, did not appear on that petition, which was withdrawn, all the other undisputed creditors of the society agreeing to accept 12*s.* 6*d.* in the pound, which was paid to them. There was nothing for distribution amongst the shareholders, as the assets when sold did not realize enough to pay the composition. The balance of this was provided by the directors out of their own pockets, and they took an assignment of the claims of the assenting creditors, and retained in hand enough to pay and offered C. 12*s.* 6*d.* in the pound on his debt.

C. refused the offer, and petitioned for a winding-up order, alleging irregularities by the society's officers, and that an investigation into its affairs was necessary. The Court was of opinion that nothing substantial would result from a winding-up order:—

Held, on the facts above stated, that the petition must be dismissed.

Semble, that, the Act of 1836 having been repealed, the society came within the class of companies forbidden by s. 4 of the Companies Act, 1862, and that there was no jurisdiction to wind it up under the Companies Acts:—

Held, also, that the society had no status to ask to be paid its costs of the petition while it relied on this point against the petitioner. *In re* ILFRACOMBE PERMANENT MUTUAL BENEFIT BUILDING SOCIETY - - Wright J. 102

CAPITAL MONEY—Improvement—New floor—Alterations with a view to letting 440
See SETTLED LAND. 1.

—— Leasing powers—Charges of estate agent for procuring lease - - - 934
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CASES—*Australian Joint Stock Bank, In re*, [1897] W. N. 48, distinguished - 453
See COMPANY. 21.

CASES—*continued.*

—— *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*, [1898] A. C. 200, 208, considered - - 122
See PATENT. 2.

—— *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467, considered - - - - 205
See NUISANCE.

—— *Bamford* v. *Turnley*, (1860) 3 B. & S. 62, considered - - - - 205
See NUISANCE.

—— *Barnhart* v. *Greenshields*, (1853) 9 Moo. P. C. 18, followed - - - - 45
See VENDOR AND PURCHASER. 4.

—— *Bates* v. *Bates*, [1884] W. N. 129, dissented from - - - - - 887
See WILL. 5.

—— *Beattie* v. *Lord Ebury*, (1872) L. R. 7 Ch. 777, 800, applied - - - 344
See PRINCIPAL AND AGENT. 1.

—— *Birkett, In re*, (1878) 9 Ch. D. 576, followed
See CHARITY. 1. 715

—— *Blake* v. *Blake*, (1880) 15 Ch. D. 481, explained - - - - 398
See WILL. 4.

—— *Bobbett* v. *South Eastern Ry. Co.*, (1882) 9 Q. B. D. 424, considered - - 738
See RAILWAY.

—— *Brereton* v. *Tuohey*, (1858) 8 Ir. C. L. Rep. 190, followed - - - 54
See LANDLORD AND TENANT. 2.

—— *Broomfield* v. *Williams*, [1897] 1 Ch. 602, applicable - - - - 834
See EASEMENT.

—— *Brown's Trusts, In re*, (1855) 1 K. & J. 522, explained and distinguished - 619
See WILL. 10.

—— *Browne* v. *Savage*, (1859) 4 Drew. 635, followed - - - - 865
See MORTGAGE. 2.

—— *Cape Breton Co., In re*, (1885) 29 Ch. D. 795, applicable - - - - 582
See COMPANY. 11.

—— *Cartwright* v. *Cartwright*, (1853) 3 D. M. & G. 982, distinguished - - - 165
See SETTLEMENT. 3.

—— *Clayton* v. *Illingworth*, (1853) 10 Hare, 451, considered - - - - 543
See SPECIFIC PERFORMANCE.

—— *Coats* v. *Chadwick*, [1894] 1 Ch. 347, not followed - - - - 860
See COMPANY. 20.

—— *Cocksedge* v. *Cocksedge*, (1844) 14 Sim. 244, distinguished - - - 165
See SETTLEMENT. 3.

—— *Coey* v. *Pascoe*, [1899] 1 Ir. R. 125, followed
See LANDLORD AND TENANT. 2. 54

—— *Collingwood* v. *Stanhope*, (1869) L. R. 4 H. L. 43, explained - - - 819
See WILL. 13.

—— *Collen* v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647, followed - - 344
See PRINCIPAL AND AGENT. 1.
Followed and applied - - 652
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CASES—*continued.*

—— *Collinson* v. *Collinson*, (1857) 24 Beav. 269, explained - - - - 398
See WILL. 4.

—— *Cook* v. *Hathway*, (1869) L. R. 8 Eq. 612, distinguished - - - 97
See COMPANY. 18.

—— *Crawley* v. *Crawley*, (1835) 7 Sim. 427; 40 R. R. 170, followed - - 64
See WILL. 3.

—— *Crown Bank, In re*, (1890) 44 Ch. D. 649, not followed - - - 860
See COMPANY. 20.

—— *Davies Brothers & Co.* v. *Davies*, (1887) 56 L. J. (Ch.) 481, not followed - 561
See COSTS.

—— *Dawson* v. *Small*, (1874) L. R. 18 Eq. 114, followed - - - - 715
See CHARITY. 1.

—— *Dearle* v. *Hall*, (1823) 3 Russ. 1; 27 R. R. 1, principle of, applied - - 865
See MORTGAGE. 2.

—— *De Brassac* v. *Martyn*, (1863) 11 W. R. 1020, considered - - - - 543
See SPECIFIC PERFORMANCE.

—— *D'Eyncourt* v. *Gregory*, (1866) L. R. 3 Eq. 382, disapproved - - - 523
See FIXTURES.

—— *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15, considered - 666
See LUNACY. 1.

—— *Duddell* v. *Simpson*, (1866) L. R. 2 Ch. 102, 108, followed - - - 908
See VENDOR AND PURCHASER. 2.

—— *Dunning, In re*, (1885) 54 L. J. (Ch.) 900, discussed - - - - 221
See RETAINER.

—— *Evers* v. *Challis*, (1859) 7 H. L. C. 531, distinguished - - - - 482
See WILL. 1.

—— *Fane, Ex parte*, (1848) 16 Sim. 406, followed
See HUSBAND AND WIFE. 424

—— *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, 62, followed and applied - - - - 652
See PRINCIPAL AND AGENT. 2.

—— *Fisk* v. *Attorney-General*, (1867) L. R. 4 Eq. 521, followed - - - 715
See CHARITY. 1.

—— *Fuller, In re*, [1900] 2 Ch. 551, distinguished
See LUNACY. 3. 3

—— *Gale* v. *Gale*, (1856) 21 Beav. 349, explained
See WILL. 4. 398

—— *Glover, In re*, [1899] 1 Ir. R. 337, followed
See INFANT. 38

—— *Gluckstein* v. *Barnes*, [1900] A. C. 240, distinguished - - - - 582
See COMPANY. 11.

—— *Gover's Case*, (1875) 1 Ch. D. 182, applicable
See COMPANY. 11. 582

—— *H.* v. *W.*, (1857) 3 K. & J. 382, distinguished - - - - 165
See SETTLEMENT. 3.

CASES—*continued.*

—— *Hadleigh Castle Gold Mines, In re,* [1900] 2 Ch. 419, approved - - 518
See COMPANY. 7.

—— *Hall* v. *Hurt,* (1861) 2 J. & H. 76, followed
See RENT-CHARGE. 419

—— *Hamilton* v. *Hamilton,* [1892] 1 Ch. 396, commented upon - - - 361
See ELECTION.

—— *Horbury Bridge Coal, Iron and Waggon Co., In re,* (1879) 11 Ch. D. 109, explained
See COMPANY. 7. 518

—— *Horsey Estate, Ld.* v. *Steiger,* [1899] 2 Q. B. 79, followed - - - 499
See LANDLORD AND TENANT. 1.

—— *Howard* v. *Patent Ivory Manufacturing Co.,* (1888) 38 Ch. D. 156, distinguished 196
See COMPANY 1.

—— *Hussey* v. *Horne-Payne,* (1879) 4 App. Cas. 311, 317, dictum of Earl Cairns L.C. in, followed - - - - 543
See SPECIFIC PERFORMANCE.

—— *Imperial Mercantile Credit Association* v. *Coleman,* (1871) L. R. 6 Ch. 558 (not overruled on one point by S. C. (1873) L. R. 6 H. L. 189) - - - 746
See COMPANY. 2.

—— *Johnstone's Settlement, In re,* (1880) 14 Ch. D. 162, explained - - - 398
See WILL. 4.

—— *Jones* v. *Jones,* [1901] 1 Ch. 464, n., followed
See PRACTICE. 3. 460

—— *Kent* v. *Stoney,* (1859) 9 Ir. Ch. Rep. 249, followed - - - - 54
See LANDLORD AND TENANT. 2.

—— *Knight* v. *Bowyer,* (1857) 23 Beav. 609; (1858) 2 De G. & J. 421, followed 45
See VENDOR AND PURCHASER. 4.

—— *Ladywell Mining Co.* v. *Brookes,* (1887) 35 Ch. D. 400, applicable - - 582
See COMPANY. 11.

—— *Lambert* v. *Northern Railway of Buenos Ayres Co.,* (1869) 18 W. R. 180, distinguished - - - - 728
See COMPANY. 4.

—— *Lassence* v. *Tierney,* (1849) 1 Mac. & G. 551, distinguished - - - 482
See WILL. 1.

—— *Loomes* v. *Stotherd,* (1823) 1 S. & S. 458; 1 L. J. (O.S.) Ch. 220; 24 R. R. 209, overruled on one point - - 221
See RETAINER.

—— *Lyon* v. *Knowles,* (1863) 3 B. & S. 556, followed - - - - 374
See COPYRIGHT.

—— *M'Cabe* v. *Bank of Ireland,* (1889) 14 App. Cas. 413, distinguished - - 97
See COMPANY. 18.

—— *Maggi, In re,* (1882) 20 Ch. D. 545, disapproved - - - - 9
See ADMINISTRATION. 2.

—— *Manser* v. *Back,* (1848) 6 Hare, 443, followed - - - - 93
See VENDOR AND PURCHASER. 1.

CASES—*continued.*

—— *Marriott* v. *Cobbett,* (1894) 38 Sol. J. 620, not followed - - - 561
See COSTS.

—— *Marsh* v. *Keating,* (1834) 1 Bing N. C. 198; 37 R. R. 75, applied - - 261
See PRINCIPAL AND AGENT. 3.

—— *Metropolitan District Ry. Co. and Cosh, In re,* (1880) 13 Ch. D. 607, considered 738
See RAILWAY.

—— *Minter* v. *Williams,* (1835) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135, considered 122
See PATENT. 2.

—— *Mumford* v. *Stohwasser,* (1874) L. R. 18 Eq. 556, not followed - - - 45
See VENDOR AND PURCHASER. 4.

—— *Negus, In re,* [1895] 1 Ch. 73, applied 239
See SOLICITOR. 3.

—— *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.,* [1899] A. C. 83, considered - - - 135
See PRACTICE. 2.

—— *Northumberland Avenue Hotel Co., In re,* (1886) 33 Ch. D. 16, followed - 196
See COMPANY. 1.

—— *Norton* v. *Dashwood,* [1896] 2 Ch. 497, explained and distinguished - 523
See FIXTURES.

—— *Norton* v. *London and North Western Ry. Co.,* (1879) 13 Ch. D. 268, considered
See RAILWAY. 738

—— *O'Neill* v. *Lucas,* (1838) 2 Keen, 313, followed - - - - 64
See WILL. 3.

—— *Penn* v. *Jack,* (1867) L. R. 5 Eq. 81, 87, considered - - - - 122
See PATENT. 2.

—— *Petre* v. *Petre,* (1853) 1 Drew. 371, considered - - - - 143
See LIMITATIONS, STATUTE OF.

—— *Phillips, In re,* (1880) 49 L. J. (Ch.) 198, disapproved - - - 64
See WILL. 3.

—— *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.,* (1899) 16 Rep. Pat. Cas. 209, approved of - - - 122
See PATENT. 2.

—— *Polhill* v. *Walter,* (1832) 3 B. & Ad. 114; 37 R. R. 344, distinguished - 652
See PRINCIPAL AND AGENT. 2.

—— *Read, Ex parte,* [1897] 1 Q. B. 122, not overruled by *In re Warren,* [1900] 2 Q. B. 138 - - - - 77
See COMPANY. 15.

—— *Reinhardt* v. *Mentasti,* (1889) 42 Ch. D. 685, 690, considered - - - 205
See NUISANCE.

—— *Richardson's Trusts, In re,* (1886) 17 L. R. Ir. 436, 442, dissented from - 677
See POWERS.

—— *Rishton* v. *Cobb,* (1839) 5 My. & Cr. 145, 152; 48 R. R. 256, followed - 412
See ANNUITY.

—— *Rodger* v. *Harrison,* [1893] 1 Q. B. 173–4, dissented from - - - 911
See VENDOR AND PURCHASER. 3.

CASES—*continued.*

—— *Rose* v. *Watson*, (1864) 10 H. L. C. 672, followed - - - - 911
See VENDOR AND PURCHASER. 3.

—— *Russell* v. *Briant*, (1849) 8 C. B. 836, followed - - - - 374
See COPYRIGHT.

—— *Scottish Petroleum Co., In re*, (1883) 23 Ch. D. 413, followed - - 115
See COMPANY. 3.

—— *Selby* v. *Alston*, (1797) 3 Ves. 339; 4 R. R. 10, followed and extended - - 921
See MERGER.

—— *Shelley's Case*, (1581) 1 Rep. 93 b, rule in, applied - - - - 720
See WILL. 12.

—— *Skrymsher* v. *Northcote*, (1818) 1 Swans. 566; 18 R. R. 142, doubted - 408
See WILL. 11.

—— *Smith* v. *Morgan*, (1880) 5 C. P. D. 337, disapproved - - - - 9
See ADMINISTRATION. 2.

—— *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, distinguished - - - - 652
See PRINCIPAL AND AGENT. 2.

—— ——————————, proposition in, at p. 11, negatived - 344
See PRINCIPAL AND AGENT. 1.

—— *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, explained and distinguished - 619
See WILL. 10.

—— *Spurgin* v. *White*, (1860) 2 Giff. 473, followed - - - - 812
See PRACTICE. 5.

—— *Stanhope Silkstone Collieries Co., In re*, (1879) 11 Ch. D. 160, considered 950
See COMPANY. 22.

—— *Sutton, Carden & Co.* v. *Goodrich*, (1899) 80 L. T. 765, followed - - 887
See WILL. 5.

—— *Swinburne, In re*, (1884) 27 Ch. D. 696, followed - - - - 677
See POWERS.

—— *Taylor* v. *Haygarth*, (1844) 14 Sim. 8, distinguished - - - - 15
See CROWN.

—— *Teape's Trusts, In re*, (1873) L. R. 16 Eq. 442, followed - - - 677
See POWERS.

—— *Treasure, In re* [1900] 2 Ch. 648, not followed on one point - - 691
See REVENUE.

—— *Warren, In re*, [1900] 2 Q. B. 138, discussed
See COMPANY. 15. 77

—— *Werderman* v. *Société Générale d'Electricité*, (1881) 19 Ch. D. 246, distinguished 196
See COMPANY. 1.

—— *Williamson* v. *North Staffordshire Ry. Co.*, (1886) 32 Ch. D. 339, followed - 561
See COSTS.

CHARGE—Rent-charge - - - 419
See RENT-CHARGE.

CHARITY—*Gift to Charity—Will—Invalid Bequest followed by Gift of Residue to Charity.*
Testator by his will, dated in 1864, gave the sum of 1000*l.* out of his personal estate to trustees, and directed that it should be invested in the names of the vicar and churchwardens of a certain church, upon trust in the first place out of the income to maintain yearly and keep in good repair and condition a tomb belonging to the testator in the churchyard, and in the next place to divide and distribute the remainder among the poor recipients of certain almshouses:—
Held, that, the gift to maintain the tomb being invalid, the whole income of the fund went to the vicar and churchwardens on behalf of the almshouses.
Fisk v. *Attorney-General*, (1867) L. R. 4 Eq. 521, *Dawson* v. *Small*, (1874) L. R. 18 Eq. 114, and *In re Birkett*, (1878) 9 Ch. D. 576, followed. *In re* ROGERSON. BIRD *v.* LEE - **Joyce J. 715**

2. —— *Secret Trust — Trust for Benefit of Public, but so that they should acquire no Rights—Charitable Gift.*
A testator established a museum and laid out a portion of his estate as a pleasure ground, and maintained the same for the benefit of the public, whom he admitted thereto under certain restrictions while reserving to himself his private rights, and he devised and bequeathed the museum and pleasure ground and an annuity of 300*l.* for the maintenance of the same to his son. The evidence established a secret trust to maintain the museum and pleasure ground, and allow the public access thereto as theretofore, but so that the public should acquire no rights:—
Held, that the intention not to give the public any rights must yield to the intention that the property should be maintained as theretofore, and that this was a trust enforceable for the benefit of the public. *In re* PITT RIVERS. SCOTT *v.* PITT RIVERS - **Kekewich J. 352**

—— Charity land—Compulsory sale—Payment into court—Interim investment—Costs
See LANDS CLAUSES ACTS. 3. 228

—— Infant — Maintenance — Subscriptions to local charities - - - 879
See SETTLED ESTATES.

CHILD-BEARING — Woman past—Presumption —Impossibility of issue—Widow who has had a child - - - 570
See EVIDENCE.

CHILDREN — Grandchildren — Marriage settlement—Construction - - 40
See SETTLEMENT. 5.

CHOSE IN ACTION — Mortgage — Priority — Notice - - - - 865
See MORTGAGE. 2.

—— Shares in company—Power of sale - 70
See MORTGAGE. 1.

CIRCULARS—Liquidator, Application to remove — Circularising shareholders — Contempt of Court - - - 860
See COMPANY. 20.

CLOSING ACCOUNT—Banker and customer—Mortgage—Power of sale - - 188
See BANKER.

COMMISSION—Lease, Charges of estate agent for procuring—Application of capital money - - - - 934
See SETTLED LAND. 4.

COMMITTEE — Lunacy — Foreign committee — English lunatic—English property 666
See LUNACY. 1.

COMMITTEE OF INSPECTION—Altering constitution of—Winding-up of company
See COMPANY. 16. 272

—— Company — Winding-up — Creditors unrepresented—Resummoning first meetings - - - - - 735
See COMPANY. 17.

COMMON—*Scheme for Regulation under Metropolitan Commons Acts—Limits of Common as defined by Scheme—Binding Effect of Scheme—Metropolitan Commons Acts*, 1866 (29 & 30 *Vict. c.* 122); 1869 (32 & 33 *Vict. c.* 107), *and Metropolitan Commons (Mitcham) Supplemental Act*, 1891 (54 & 55 *Vict. c. xxvi.*).

Where a scheme for the regulation of a common has been framed and confirmed under the Metropolitan Commons Act, 1866, it is conclusive as to the limits and extent of the common. The owner of any land which is included in the plan embodied in the scheme cannot, after the passing of the Act confirming the scheme, successfully assert his title thereto. COOK *v.* MITCHAM COMMON CONSERVATORS
Farwell J. 387

2. —— *Scheme made under Metropolitan Commons Acts—Limits of Common as defined by Scheme—Binding effect of Scheme—Injunction.*

The plaintiffs claimed an injunction to restrain the defendant from erecting any wall or building upon any part of the common subject to their jurisdiction.

The plaintiffs were appointed conservators of Chislehurst Common by a scheme made under the Metropolitan Commons Acts of 1866 and 1869. The defendant alleged that he was the owner of a piece of land forming part of the common as defined by the scheme. The plaintiffs alleged that the defendant had purchased the piece of land in question with notice of the scheme and the Act by which it was confirmed, but that he had notwithstanding commenced to build a wall for the purpose of inclosing the land. They consequently brought this action, and now moved for an interim injunction:—

Held, that the plaintiffs were entitled to the order. CHISLEHURST COMMON CONSERVATORS *v.* NEWTON - - - Chitty J. 389, n.

COMPANY — *Contract — Contract on behalf of intended Company — Ratification — Privity of Contract — New Contract — Patent — Licence — Burden attaching to Property—Right of Action.*

By an agreement of March 3, 1897, made between the plaintiff company and P., the plaintiff company agreed to grant to P. an exclusive licence to use a patent in consideration of an annual payment to be made to the plaintiff company by a company in the course of formation by P., and on March 4 the licence was granted to P., and was expressed to be in consideration of the agreement and the payment therein agreed upon. By an agreement of March 5 P. agreed to sell to a trustee for the intended company (which subsequently became the defendant company) the agreement of March 3 and the licence, and by an agreement of April 8, under the seal of the defendant company, the agreement of March 5 was adopted by that company. The defendant company acted in the belief that it was bound to the plaintiff company to perform the obligations of the agreement of March 3. In an action by the plaintiff company against the defendant company to restrain an alleged breach of that agreement:—

Held, (1.), following *In re Northumberland Avenue Hotel Co.*, (1886) 33 Ch. D. 16, and distinguishing *Howard* v. *Patent Ivory Manufacturing Co.*, (1888) 38 Ch. D. 156, that the Court ought not to infer a contract between the plaintiff company and the defendant company, and that there was no privity of contract between them; (2.) distinguishing *Werderman* v. *Société Générale d'Electricité*, (1881) 19 Ch. D. 246, that the obligations imposed by the agreement of March 3 were not a burden attaching to the licence itself in the hands of any persons taking with notice:—

Held, therefore, that the plaintiff company had no right of action. BAGOT PNEUMATIC TYRE COMPANY *v.* CLIPPER PNEUMATIC TYRE COMPANY - - - Kekewich J. 196

2. —— *Director—Fiduciary Relation—Conflict of Interest with Duty—Contracts with Company—Articles of Association — Vacation of Office—Director having an Interest in Contracts—Disclosure of Interest—Voting—Profits—Account.*

By the articles of association of a limited railway company, it was provided that a director should vacate his office if he was concerned in, or participated in the profits of, any contract with the company without declaring the nature of his interest; but "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company; or by reason of his being interested, either in his individual capacity, or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest"; but the director was not to vote on any contract of this kind, and if he did, his vote was not to be counted.

In 1886, shortly after its formation, the railway company, of which F. was a director, entered into contracts with a steamship company for the carriage and shipment of bananas. F. was the largest shareholder in the steamship company, and was also a partner in the firm that managed it; no disclosure of F.'s interest was made either in the prospectus of the railway company, or when the contracts were entered into, nor did he ever "declare the nature of his interest" pursuant to the articles of association; but his co-directors of the railway company were aware that he had some interest in the steamship company. F. continued a director of the railway company until 1896, when he resigned, and shortly afterwards that

COMPANY—*continued.*

company brought an action against him to make him liable for all profits received by him as shareholder in the steamship company, and as partner in the firm that managed it, under the contracts with the plaintiff company. F. having died before the trial, the action was revived against his executors:—

Held, affirming the decision of Byrne J., [1900] 1 Ch. 756, that, on the articles of association, and on the authority of *Imperial Mercantile Credit Association* v. *Coleman*, (1871) L. R. 6 Ch. 558 (not overruled on this point by S. C. (1873) L. R. 6 H. L. 189), F.'s estate was not liable to account for any profits made by him out of the contracts with the plaintiff company.

Consideration of the equitable rule prohibiting a person who stands in a fiduciary relation from entering into engagements in which his interest may conflict with his duty, except on the condition of accounting for all profits he may receive from such engagements to the person towards whom he stands in the fiduciary relation. COSTA RICA RAILWAY COMPANY *v.* FORWOOD
C. A. 746

3. —— *Directors — Quorum — Breach of Regulation by Directors—Validity of Acts as regards Third Parties.*

A company's articles of association provided that its affairs should be conducted by a council of administration; that the number of members of the council should not be less than three; that the continuing council might act notwithstanding any vacancy; and that the council might determine the quorum necessary for the transaction of business. The members of the council became reduced to two, and those two members acting in the name of the company gave securities for debts of the company to persons who had no knowledge of the irregularity. It was not proved that any resolution fixing a quorum had been passed by the council:—

Held, that the securities so given were binding on the company.

One of the securities was transferred by the creditor to whom it was given to one of the two members of the council, who had himself paid off the secured debt:—

Held, that the security was valid in the hands of the transferee.

Decision of Wright J., [1900] 2 Ch. 272, affirmed on the first point, though reversed on a further question of fact, and affirmed on the second.

In re Scottish Petroleum Co., (1883) 23 Ch. D. 413, followed. *In re* BANK OF SYRIA. OWEN AND ASHWORTH'S CLAIM. WHITWORTH'S CLAIM
C. A. 115

4. —— *Director — Remuneration fixed by Articles of Association—Resolution of Board to forego—Vacating Office of Director by Absence for Specified Period—Date from which Period runs.*

By the articles of association of a company each of its directors was to be paid out of its funds by way of remuneration 300*l.* per annum, and the office of a director was to be vacated if he absented himself from directors' meetings during a period of three calendar months without special leave of absence from the directors.

COMPANY—*continued.*

M. was appointed a director on August 3, 1898, and attended meetings of directors down to February 3, 1899, on which last-named date he attended a meeting at which they, including himself, passed a resolution "that no remuneration be received by the directors for their services until a dividend is declared on the ordinary shares of the bank." There was no further meeting from February 3 to March 3, 1899. From February 3 he absented himself without leave until after May 7, 1899, on which another directors' meeting was held, and on May 8, 1899, received a written notice from the board stating that he had ceased to be a director pursuant to the articles, and that the fact of his non-attendance for three months had been ordered to be entered on the minutes. M. did not insist on being reinstated and did not attend a meeting of directors on June 3. The company went into liquidation on December 29, 1899, and no dividend was declared on the ordinary shares. M. claimed to prove for remuneration from the date of his appointment until the winding-up:—

Held, (1.) distinguishing *Lambert* v. *Northern Railway of Buenos Ayres Co.*, (1869) 18 W. R. 180, that, the remuneration not being due until the end of a year, and the agreement to pay it being on February 3 only partially performed and not broken, the resolution was effective; (2.) that the period of absence only began to run from March 3, 1899, terminating on June 3; (3.) that the remuneration was not apportionable, and that the claim of M. failed.

Observations as to when a director absents himself. *In re* LONDON AND NORTHERN BANK. MCCONNELL'S CLAIM - - Wright J. 728

5. —— *Dividend — Accretion to Capital — Capital or Profits.*

The question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital, as well as profit and loss, and though dividends may be paid out of earned profits in proper cases, notwithstanding a depreciation of capital, a realized accretion to the estimated value of one item of the capital assets cannot be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

Among the assets taken over by a new company in 1897, on the purchase of the undertaking of an old company, were promissory notes for $100,000 given in 1894 to the old company by the B. Company; these notes, which had never been considered of any value, and had never appeared as assets in the balance-sheets of the new company, had recently been paid off with arrears of interest, and the directors proposed to treat the whole sum as a windfall in the nature of an unexpected profit and divisible as dividends:—

Held, that the $100,000 ought not to be distributed as dividend without reference to the other business or assets of the company. FOSTER *v.* NEW TRINIDAD LAKE ASPHALT COMPANY
Byrne J. 208

6. —— *Dividend, Payment of — "Profits available for Dividend"—Setting apart Reserve*

COMPANY—*continued.*

Fund — Articles partly excluding Table A — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Sched. I., Table A, clause* 74.

The memorandum of association of a company provided that, as between the holders of the ordinary shares and the holders of the founders' shares, "the profits from time to time available for dividend" should be applicable as follows: (1.) to the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the shares other than the founders' shares; (2.) of the surplus, two-thirds should be applicable to the payment of a further dividend on the shares other than the founders' shares, and the remaining one-third should be applicable to the payment of dividend on the founders' shares.

The articles of association provided (clause 1) that, so far as they did not exclude or modify the regulations contained in Table A in Sched. I. to the Companies Act, 1862, those regulations should, so far as applicable, be deemed to be the regulations of the company. The articles expressly excluded some of the clauses of Table A, but did not expressly exclude clause 74, which provides that "the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends":—

Held, that clause 74 of Table A was not in toto excluded by implication, but that it must be taken to form part of the articles; that "profits available for dividend" meant the net profits after making any deductions which the directors could properly make before declaring a dividend, and that the directors were justified, after paying a dividend of 15 per cent. to the ordinary shareholders, in setting aside as a reserve fund to meet contingencies so much of the surplus of the profits of a year as they thought fit.

Decision of Kekewich J. reversed.

Per Romer L.J.: Whether the directors could have set aside a reserve fund for the purpose of equalizing dividends, *quære*. FISHER *v.* BLACK AND WHITE PUBLISHING COMPANY - C. A. 174

7. —— *Meeting—Special Resolution—Voting —Show of Hands—Declaration of Chairman that Resolution is Carried—"Conclusive Evidence"— Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

By virtue of s. 51 of the Companies Act, 1862, the declaration of the chairman of a meeting of the shareholders of a company that a special resolution has been carried on a show of hands (a poll not having been demanded) is, at any rate in the absence of fraud, absolutely, and not merely primâ facie, conclusive of the fact that the resolution has been carried.

In re Hadleigh Castle Gold Mines, [1900] 2 Ch. 419, approved.

In re Horbury Bridge Coal, Iron and Waggon Co., (1879) 11 Ch. D. 109, explained. ARNOT *v.* UNITED AFRICAN LANDS, LIMITED - C. A. 518

8. —— *Memorandum of Association—Objects —Amalgamation — Sale of Business to another Company—Purchase-money—Shares in purchasing Company—Agreement not to carry on Business— Ceasing to carry on Business—Ultra vires—*

COMPANY—*continued.*

Debentures—Floating Charge—Substituted Security —Dissenting Debenture-holders, Rights of.

The memorandum of association of a limited company included, among its objects, the carrying on of a business of a specified nature, and also the carrying into effect of arrangements for amalgamation or union of, or sharing in interests whether in whole or in part with, any other company carrying on any business similar or analogous to any business authorized by the memorandum; and also the sale of all or any part of the company's business or property and the holding of any debentures, shares, stocks, or securities of any other company.

The company sold the whole of its property and assets, including the goodwill, with the exception of certain securities, which it retained as its own property, to a new company formed for the purpose of acquiring and working the old company's business and similar undertakings, the sale being in consideration of debenture stock and shares in the new company, and the old company agreeing not to carry on any similar business otherwise than in conjunction with and for the benefit of the new company.

The old company had, before the sale, issued debentures charging, "by way of floating security, all its property, undertaking, and assets for the time being, whether present or future," and becoming immediately payable upon an order or effective resolution to wind up.

In a debenture-holders' action against the old company claiming that by the sale it had ceased to carry on its objects as defined by the memorandum, and that therefore the debenture charge immediately attached:—

Held, that the plaintiff's claim failed, because (1.) the sale was not ultra vires of the memorandum of association; (2.) the old company's undertaking had not ceased to be a going concern, so that the debentures were still nothing more than a "floating security"; and (3.) the debentures, being a floating security, did not give the holders any right to interfere with what the company had done in the ordinary course of its business as defined in the memorandum of association.

Decision of Farwell J. reversed.

Decision of North J., [1899] 2 Ch. 130, disapproved.

Per Vaughan Williams L.J.: Whether on the sale the old company could preclude itself from exercising its powers in respect of what was in fact the principal object included in the memorandum, and whether so to do would not endanger the security of the debenture-holders by limiting and altering it, *quære*. *In re* BORAX COMPANY. FOSTER *v.* BORAX COMPANY - - C. A. 326

9. —— *Memorandum of Association—Verbal Alteration—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 5.

The Companies (Memorandum of Association) Act, 1890, does not authorize alterations in the memorandum which merely amplify the description of objects clearly comprised in the original memorandum of association. *In re* CONSETT IRON COMPANY - - Cozens-Hardy J. 236

10. —— *Memorandum of Association, Altera-*

COMPANY—*continued.*

tion of— Confirmation by the Court—Consent of Board of Trade—Practice—Association not for Profit—Licence—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 23—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1.

Where a company registered under s. 23 of the Companies Act, 1867, by licence of the Board of Trade, as a company not for purposes of gain, with limited liability but without the addition to its name of the word "limited," desires to alter its memorandum of association, the proper course is to apply in the first instance to the Board of Trade, and submit to the Board the memorandum shewing all the proposed alterations; and if the Board approve them as being consistent with the continuation of the licence the Court will then entertain the application of the company for the sanction of the Court to the alterations. *In re* St. Hilda's Incorporated College, Cheltenham - - **Buckley J. 556**

11. —— *Promoter—Secret Profit—Duty as to Extent of Disclosure.*

A syndicate, of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus shewing that the directors were aware that similar properties were often resold "to the public" at a profit, and were "not unmindful of the benefit that" might "arise by converting the syndicate into a very much larger company within a short period."

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase-money much larger than what had been paid for and expended upon the mine by the syndicate. The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors, that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and, subject as aforesaid, there was nothing in the prospectus to shew that the sale was at a profit.

The Court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding-up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company:—

Held, (1.) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2.) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

COMPANY—*continued.*

(3.) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4.) That although the company might have had a right to rescind the contract, S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein v. *Barnes*, [1900] A. C. 240, distinguished.

Semble, that *Gover's Case*, (1875) 1 Ch. D. 182; *In re Cape Breton Co.*, (1885) 29 Ch. D. 795; and *Ladywell Mining Co.* v. *Brookes*, (1887) 35 Ch. D. 400, are still binding authorities. *In re* Lady Forrest (Murchison) Gold Mine, Limited **Wright J. 582**

12. —— *Shares—Restrictions on Transfer—Compulsory Transfer at specified Price in Event of Shareholder's Bankruptcy—Articles of Association—Repugnancy—Rule against Perpetuity—Fraud on Bankruptcy Law—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 16.

Provisions in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price are not void as being repugnant to absolute ownership, or as tending to perpetuity.

There is nothing obnoxious to the bankruptcy law in articles which bonâ fide provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and is not shewn to be less than the fair price which might otherwise be obtained.

A share in a company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the company, measured, for the purposes of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862, and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money.

The rule against perpetuity has no application to personal contracts. Borland's Trustee *v.* Steel Brothers & Co. - **Farwell J. 279**

13. —— *Shares paid for otherwise than in Cash—Omission to file Contract—Relief by Court—Jurisdiction—Form of Memorandum to be filed—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 33, 36.

Notwithstanding the repeal of s. 25 of the Companies Act, 1867, by s. 33 of the Companies Act, 1900, the Court has, in a case in which no contract as required by s. 25 has been filed with respect to shares issued before the repeal, power under s. 1 of the Companies Act, 1898, to give relief by ordering the filing of a contract or a memorandum in lieu of a contract, which shall operate in relation to the shares as if a contract had been duly filed before their issue.

Whether, notwithstanding s. 33 of the Act of

COMPANY—*continued.*

1900, s. 25 of the Act of 1867 has not still some operation as regards transactions to which it applied before the commencement of the Act of 1900, *quære.*

Form of memorandum ordered to be filed under s. 1 of the Companies Act, 1898. *In re* BRUTTON & BURNEY, LIMITED. *In re* BURNEY'S NEW CROSS BREWERY COMPANY - - - **C. A. 637**

14. —— *Voting—Disqualification—Forfeiture of Shares—Purchaser of Forfeited Shares Disqualified from Voting whilst Calls remain Due from Original Holder.*

By the articles of association of a company it was provided that after the forfeiture of shares the directors of the company should be entitled to recover from the shareholder calls and other sums due in respect of the forfeited shares, and that no member should be entitled to vote whilst any calls or other sums should be due and payable to the company in respect of the shares of such member.

Shares were forfeited for non-payment of calls, and resold by the company to a purchaser, to whom a certificate was issued stating that he was to be deemed to be the holder of the shares discharged from all calls due:—

Held, that the purchaser of the shares was not entitled to vote whilst any calls or other sums remained due and payable to the company from the original holder of the shares. RANDT GOLD MINING COMPANY *v.* WAINWRIGHT

Kekewich J. 184

15. —— *Winding-up—Bankruptcy—Fraudulent Preference—Surety—"Creditor"—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 37; *s.* 48, *sub-s.* 1.

The word "creditor" in s. 48 of the Bankruptcy Act, 1883 (which avoids as a fraudulent preference a charge or payment made by an insolvent debtor "in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference"), means any person who at the date when the charge or payment is made is entitled, if bankruptcy supervenes, to prove in the bankruptcy and share in the distribution of the bankrupt's estate. A surety who has a right of proof under s. 37 of the Act in respect of his contingent liability as surety is such a person. A charge, therefore, given to a surety, before he has been called upon to pay as surety, may be a fraudulent preference.

Ex parte Read, [1897] 1 Q. B. 122, is not on this point inconsistent with, and has not been overruled by, *In re Warren*, [1900] 2 Q. B. 138. *In re* BLACKPOOL MOTOR CAR COMPANY, LIMITED. HAMILTON *v.* BLACKPOOL MOTOR CAR COMPANY, LIMITED - - - - **Buckley J. 77**

16. —— *Winding-up—Committee of Inspection—Altering Constitution of—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *ss.* 6, 9, 23, 24, *Sched. I., r.* 6.

Where a creditor, or a class of creditors (with a substantial interest), of a company which is being wound up by the Court is, through no fault of his or its own, unrepresented on the committee of inspection, the Court may direct the liquidator

COMPANY—*continued.*

to summon a meeting of the creditors to consider whether one or more members of the committee should be removed and some other person or persons, representative of the "aggrieved" and unrepresented creditor or creditors, appointed in substitution; or *semble*, may order fresh first or further meetings of the creditors and contributories to be summoned for the following purpose of s. 6 of the Act of 1890, namely, to determine whether an application is to be made to the Court to appoint a committee of inspection, and who are to be its members if appointed. *In re* RADFORD & BRIGHT, LIMITED (No. 1) **Wright J. 272**

17. —— *Winding-up—Committee of Inspection—Creditors unrepresented—Resummoning First Meetings—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *ss.* 6, 9.

In the winding-up of a company by the Court, the Court has power to order the first meetings of the creditors and contributories to be resummoned, and it may limit the purposes of the meetings to the selection of persons to be appointed as members of the committee of inspection.

Where a creditor of a company for a large amount was unrepresented on the committee of inspection, and at a meeting of the creditors, summoned by the direction of the Court, a resolution was passed that it was desirable that the creditor should be represented on the committee, but a majority of the creditors at the meeting expressed the opinion that it was undesirable that any members of the present committee should retire, the Court directed the first meetings to be resummoned to determine whether a committee should be appointed and who should be the members of it. *In re* RADFORD & BRIGHT, LIMITED (No. 2) - **Wright J. 735**

18. —— *Winding-up—Contributory—Enforcing Payment of Calls made before Winding-up—Application to stay Proceedings till Costs of Discontinued Action by Company paid—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 101—*Rules of Supreme Court*, 1883, *Order XXVI., rr.* 1, 4.

A company, while a going concern, sued Y. for calls on shares alleged to be held by him. Before the action was ripe for trial the company resolved on voluntary winding-up, and the liquidator settled Y. on the list of contributories in respect of the amount of the calls. The liquidator then by notice discontinued the action, and took out an originating summons against Y. under ss. 101 and 138 of the Companies Act, 1862, for a balance order in respect of the calls. Y.'s costs of the action having been taxed and the liquidator having refused to pay them, Y. applied for a stay of the originating summons until payment:—

Held, that Y. was not entitled to the stay, but that the amount of the costs must be deducted from any sum recovered by the liquidator on the originating summons.

Cook v. *Hathway*, (1869) L. R. 8 Eq. 612, and *M'Cabe* v. *Bank of Ireland*, (1889) 14 App. Cas. 413, distinguished. *In re* UNITED SERVICE ASSOCIATION - - - **Wright J. 97**

19. —— *Winding-up—Fraudulent Preference*

COMPANY—*continued.*

—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164 —*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 28 (*repealed*), 48.

Sect. 164 of the Companies Act, 1862, although it uses the words "undue or fraudulent preference," does not extend the operation of the fraudulent preference clause (s. 48) of the Bankruptcy Act, 1883, which is thereby applied to companies being wound up under the Companies Acts.

Within three months before the commencement of its winding-up a company was indebted to H., and was to the knowledge of its directors unable to pay its debts as they became due from its own moneys. The chairman of its directors was personally liable on an acceptance of the company for part of the debt due to H. In pursuance of a scheme resolved upon by the directors with the very object of relieving the chairman from his liability, debentures of the company were allotted to H. as a collateral security for his debt:—

Held, that the transaction was not a fraudulent preference, and that the debentures were valid. *In re* THE STENOTYPER, LIMITED. HASTINGS BROTHERS *v.* THE STENOTYPER, LIMITED
Cozens-Hardy J. 250

20. —— *Winding-up — Liquidator, Application to Remove — Circularising Shareholders — Contempt of Court.*

In a voluntary winding-up a shareholder took out a summons on behalf of himself and the other shareholders of the company asking for the removal of the voluntary liquidator from office, and in support filed an affidavit stating what he alleged to be the facts justifying the application. Before the summons came on for hearing he issued a circular to the other shareholders, in substance repeating what he had stated in the affidavit, and asking the shareholders to support his application. The liquidator then served notice of motion for an injunction to restrain the issuing of the circular or any other like document, on the ground that it was a contempt of Court:—

Held, that the circular could not in any way interfere with or prejudice the due trial of the matter, and was not a contempt of Court, and that the liquidator's application must be dismissed.

Semble, that *Coats* v. *Chadwick*, [1894] 1 Ch. 347, so far as it decided that the plaintiff had been guilty of contempt, and *In re Crown Bank*, (1890) 44 Ch. D. 649, were not rightly decided. *In re* NEW GOLD COAST EXPLORATION COMPANY
Cozens-Hardy J. 860

21. — *Winding-up—Petition — Creditor with Debt payable at a Future Date—Debenture Stockholder's Petition—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80, 82.

A debenture stockholder of a company who has no present claim for principal or interest is not a creditor in such a sense as to be entitled to petition for a winding-up order.

In re Australian Joint Stock Bank, [1897] W. N. 48, distinguished.

The effect of provisions in a debenture stock trust deed as to the security being enforceable immediately on a breach of covenant by the company considered. *In re* MELBOURNE BREWERY AND DISTILLERY - - Wright J. 453

COMPANY—*continued.*

22. —— *Winding-up — Secured creditor — Garnishee Order—Application of Law of Bankruptcy — Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

Sect. 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under attachments of debts, is not made applicable by s. 10 of the Judicature Act, 1875, to the winding-up of insolvent companies, and therefore it is still the law, as recognised in *In re Stanhope Silkstone Collieries Co.*, (1879) 11 Ch. D. 160, that a judgment creditor who has obtained a garnishee order nisi to attach a debt owing by a company to his debtor, and has served the order on the company before the commencement of its winding-up, is a secured creditor and entitled to the debt as against the liquidator. *In re* NATIONAL UNITED INVESTMENT CORPORATION - - - Wright J. 950

—— Forfeiture—Relief of underlessee against—Solvent company — Voluntary liquidation—Discretion of Court - - 499
See LANDLORD AND TENANT. 1.

—— Illegal company—Jurisdiction to wind up—Repeal of statute under which certified
See BUILDING SOCIETY. 2. 102

—— Shares in company—Mortgage—Chose in action—Power of sale - - 70
See MORTGAGE. 1.

—— Will—Partnership—Conversion into company—Agreement by executors—Jurisdiction to sanction - - - 701
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COMPENSATION—Lands Clauses Act - 591
See LANDS CLAUSES ACT. 2.

—— Married woman—Restraint on anticipation—Removal of disability - - 361
See ELECTION.

—— Specific performance—Conditions of sale—Misleading particulars — Statement by auctioneer - - - - 93
See VENDOR AND PURCHASER. 1.

COMPROMISE—*Practice—Power of Court to bind Absent Persons—Extent of Jurisdiction—Rules of Supreme Court, Order XVI., r.* 9A.

In an action on behalf of the holders of bonds (payable to bearer), issued by a railway company, against the trustees for the bondholders, the company, and other defendants, the Court in 1894 sanctioned a scheme for the compromise of the action, and, being of opinion that the scheme would be for the benefit of all the bondholders who were not parties to the proceedings, ordered that it should be carried into effect so as to be binding on all the holders of the outstanding bonds, other than three specified persons who dissented and for whose claims provision was made. The scheme provided that out of the funds then in the hands of the trustees there should be set aside for distribution in respect of 61,383 bonds which were then outstanding, "when and as soon as the holders thereof shall be duly ascertained, within fourteen days after presentation of the same for payment, upon such bonds being delivered up to be cancelled," a sum sufficient to pay 2*l.* 10*s.* in respect of each bond. The

COMPROMISE—*continued.*
order directed payment accordingly to the bondholders. After this order had been made, most of the bondholders from time to time surrendered their bonds upon payment to them respectively of the sum of 2*l.* 10*s.* for each bond surrendered. Ultimately there remained 1700 bonds still outstanding. Every effort had been made, by means of advertisements and otherwise, to discover the holders of these bonds, but without success:—

Held (by Rigby and Stirling L.JJ., Vaughan Williams L.J. dissenting), that the Court had no jurisdiction to limit a time within which the unascertained holders of the outstanding bonds must come in, or otherwise be excluded from the benefit of the scheme.

Per Vaughan Williams L.J.: In construing the scheme it ought to be implied, even as against unascertained bondholders, that they must elect within a reasonable time whether they would come in under the scheme. COLLINGHAM *v.* SLOPER - - - - - C. A. 769

—— Solicitor — Costs — Lien — Infants — Judgment—Form of order - - - 317
See SOLICITOR. 1.

CONDITIONS OF SALE—Misleading particulars —Statement by auctioneer — Compensation—Specific performance - 93
See VENDOR AND PURCHASER. 1.

—— Rescission — Pending litigation — Costs — Jurisdiction - - - - 908
See VENDOR AND PURCHASER. 2.

CONFLICT OF LAWS—*Domicil—Personal Property—Settlement—Power of Appointment—Will.*
On the marriage of an Englishwoman with a domiciled Frenchman, English personal property was settled in English form with English trustees on such trusts as the intended wife should by will appoint, and subject thereto for her separate use:—

Held, that the settlement was governed by English law, and that, subject to the payment of separate debts of the wife, the settled property passed under the will of the wife notwithstanding limitations imposed by French law on testamentary disposition. *In re* MÉGRET. TWEEDIE *v.* MAUNDER - - Cozens-Hardy J. 547

CONTEMPT OF COURT—Liquidator, Application to remove—Circularising shareholders
See COMPANY. 20. 860

CONTRACT—Agent, Liability of—Want of authority—Knowledge of, by other contracting party - - - - 344
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—— Corporation shareholders — Validity—Electric lighting—City of London - 602
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—— Director—Fiduciary relation—Conflict of interest with duty — Contracts with company - - - - 746
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—— Omission to file contract—Relief by Court—Jurisdiction - - - - 637
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—— Ratification—Privity of contract — Burden attaching to property—Right of action
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CONTRIBUTORY—Enforcing payment of calls —Application to stay proceedings till costs of discontinued action by company paid - - - - - 97
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CONVERSION — Sale and — Appropriation of specific assets — Leaseholds — Settled shares—Land Transfer Act - 681
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—— Will—Partnership—Conversion into company — Agreement by executors — Jurisdiction to sanction - - 701
See WILL. 8.

CONVEYANCE—*Construction—Words of Limitation—Habendum to Grantee "in Fee"—Supplying Omission from Context—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 51.
Under s. 51 of the Conveyancing and Law of Property Act, 1881, in a deed, in order to pass the legal estate in fee simple, it is necessary, in the absence of the word "heirs," to use the actual words of limitation mentioned in the section, namely, in fee simple.

Therefore, where after the passing of the Act, freehold land, upon payment off of a mortgage thereon, was expressed to be reconveyed to the mortgagor to hold the same unto and to the use of the mortgagor in fee freed from the mortgage:—

Held, that (apart from any question of rectification) the word "simple" could not consistently with the Act be supplied by construction from the context, and that the legal estate in the fee simple did not pass. *In re* ETHEL AND MITCHELLS AND BUTLERS' CONTRACT
Joyce J. 945

CONVEYANCING AND LAW OF PROPERTY—Forfeiture — Relief of underlessee against—Solvent company—Voluntary liquidation—Discretion of Court 499
See LANDLORD AND TENANT. 1.

—— Infant taking by descent—Appointment of trustees - - - - 38
See INFANT.

—— Light — Derogation from grant—Implication—Plan shewing building line 834
See EASEMENT.

—— Words of limitation—Habendum to grantee "in fee"—Supplying omission from context - - - - 945
See CONVEYANCE.

COPYRIGHT—*Infringement—"Printed or cause to be printed"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 15, 20, 21—*Dramatic Copyright Act*, 1833 (3 & 4 *Will.* 4, *c.* 15)—*Agent.*
Gavin being about to publish a work to be entitled "Lloyds' Diary for Merchants, Shippers, and Foreign Buyers for the year 1900," entered into an arrangement with Lloyds that the work should be published under their supervision and in conjunction with them, and that they should print it, they receiving 100*l.* a year for the use of their name and certain commissions. Lloyds instructed their agents abroad to assist in the

COPYRIGHT—*continued.*

bringing out of the work by giving such information as was required.

The work was proceeded with and Lloyds began the printing, but time being short Gavin, with the consent of Lloyds, caused a certain portion of the work to be printed by another printer. The work was ultimately published, and on the title-page appeared the words, "Printed at Lloyds', Royal Exchange, London."

The portion of the work not printed by Lloyds contained certain lists which, as proved at the trial, had been compiled by copying and printing the names and other particulars contained therein from the plaintiffs' Directory of Merchants, Manufacturers, and Shippers.

The question was whether Lloyds were responsible for the printing of the pirated portion, and ought to pay the costs. Gavin did not appear:—

Held, that there was no partnership between Gavin and Lloyds, that the printer of the pirated portion was not the agent of Lloyds, and that Lloyds had not "caused" the pirated portion of this work to be printed within the meaning of s. 15 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), consequently that the plaintiffs were not entitled to costs as against Lloyds, but that Lloyds, having allowed their name to appear as the printers, were not entitled to costs.

Russell v. *Briant*, (1849) 8 C. B. 136, and *Lyon* v. *Knowles*, (1863) 3 B. & S. 556, discussed, and the principles there enunciated followed. KELLY'S DIRECTORIES, LIMITED *v.* GAVIN AND LLOYDS - - - - **Byrne J. 374**

CORPORATION — *Contracts — Validity—Electric Lighting — Municipal Corporation — City of London—Corporation Shareholders—Prohibition —Penalty—Members of Corporation "directly or indirectly interested or concerned in" Contract— Novation — Construction of Statute — Ejusdem Generis — City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*), *ss.* 33–42, 116—*City of London Sewers Act*, 1851 (14 & 15 *Vict. c. xci.*), *s.* 53.

By ss. 33–42 of the City of London Sewers Act, 1848, the Commissioners of Sewers (whose statutory powers were afterwards vested in the mayor and corporation of the City of London) were empowered, under certain conditions and safeguards, to enter into contracts for the execution of works authorized by the Act, or for the supply of materials or labour, "or for any other matters or things whatsoever necessary for enabling them to carry the purposes of the Act into effect," and, in particular, s. 42 enacted that "no person, being a Commissioner, or a member of the Court of Aldermen or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void," and that the Commissioner, &c., so interested or concerned should for every such offence forfeit 100*l.* By s. 116 the Commissioners

CORPORATION—*continued.*

were empowered to enter into contracts with gas companies and other persons to supply gas, "or to light the City by any other mode," "lighting contracts" not having been specifically mentioned in any previous section.

The Commissioners subsequently entered into three electric lighting contracts, two of them being with the Brush Company, and one with a syndicate. At the date of the contracts some of the Commissioners, aldermen, and common councilmen were shareholders in the Brush Company, but not in the syndicate. Shortly afterwards the company and syndicate assigned their contracts to the plaintiffs, another electric lighting company, whose shareholders included several Commissioners, aldermen, and common councillors:—

Held, by the Court of Appeal, reversing Farwell J., (1.) that s. 42 applied to every kind of contract under the Act, including any lighting contract under s. 116, and was not restricted to "construction contracts" under the sections preceding s. 42; and (2.) that consequently s. 42 rendered the two contracts with the Brush Company "null and void," ab initio, by reason of there being Commissioners, &c., "interested" therein as shareholders of the company at the date of the contracts, but that the contract with the syndicate was good in its inception through there being no Commissioner, &c., interested therein at the date thereof, and that its subsequent assignment to the plaintiff company, though that company included Commissioners, &c., among its shareholders, did not constitute such a novation of the contract as to render it null and void within the section. CITY OF LONDON ELECTRIC LIGHTING COMPANY *v.* LONDON CORPORATION - - - - **C. A. 602**

2. —— *County Council—Municipal Corporation—Common Law Corporation—General Powers — Statutory Powers — Tramway Business — Municipal Trading—Omnibus Business—Ancillary Business — Incidental Powers — Ultra Vires — Attorney-General, Action by—Ratepayers—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 10, *sub-s.* 1 — *Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 1, 2, 68, 79—*London County Tramways Act*, 1896 (59 & 60 *Vict. c. li.*), *ss.* 2, 10—*London Tramways Company (Limited) Act*, 1896 (59 & 60 *Vict. c. clxxxix.*), *s.* 31—*London County Council (Vauxhall Bridge Tramways) Act*, 1896 (59 & 60 *Vict. c. ccxi.*), *s.* 21.

A county council being incorporated under s. 79 of the Local Government Act, 1888, is a purely statutory body, and does not possess, under s. 2 of that Act coupled with s. 10, sub-s. 1, of the Municipal Corporations Act, 1882, the wide powers of a municipal or common law corporation.

Consequently, where a county council had statutory powers to own and work "tramways" only:—

Held, by the Court of Appeal, affirming Cozens-Hardy J., that the council was acting ultra vires in becoming omnibus proprietors and running omnibuses as feeders to the tramways, the omnibus business not being covered by the council's statutory powers as being a business by

CORPORATION—*continued.*
necessary implication incidental or ancillary to the tramway business:

Held, also by the Court of Appeal, that an action for injunction was properly brought in the name of the Attorney-General by rival omnibus proprietors who were also ratepayers in the county. ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL - - - - **C. A. 781**

COSTS—*Higher Scale—Special Grounds—Practice—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 9.

The fact that the title to an estate dealt with in a partition action was a complicated and difficult one, and that the action had been conducted by the solicitors in an exceptionally able and diligent manner whereby much time and expense had been saved, is not a special ground "arising out of the nature and importance, or the difficulty of the case," sufficient to enable the Court to order costs to be paid on the higher scale under Order LXV., r. 9.

Williamson v. *North Staffordshire Ry. Co.* (1886) 32 Ch. D. 339, followed.

Davies Brothers & Co. v. *Davies*, (1887) 56 L. J. (Ch.) 481, *Re Leeuw*, (1892) 93 L. T. Jour. 333, and *Marriott* v. *Cobbett*, (1894) 38 Sol. J. 620, examined, and not followed. RIVINGTON *v.* GARDEN - - - - - **Buckley J. 561**

—— Conditions of sale — Rescission—Pending litigation—Jurisdiction - - **908**
See VENDOR AND PURCHASER. 2.

—— Interim investment—Payment into court—Charity land—Compulsory sale - **228**
See LANDS CLAUSES ACTS. 3.

—— Lands Clauses Act—Landowner—Notice to treat - - - - - - **591**
See LANDS CLAUSES ACTS. 2.

—— Lands Clauses Acts—Interim Investment—Brokerage and other charges - **923**
See LANDS CLAUSES ACTS. 4.

—— Lease — Preliminary negotiations — Third party - - - - - **239**
See SOLICITOR. 2.

—— Patent — Infringement — "Subsequent action" - - - - - **414**
See PATENT. 1.

—— Shorthand notes of judgment - **523**
See FIXTURES.

—— Solicitor.
See Cases under SOLICITOR.

COUNTY COUNCIL—General powers—Statutory powers—Tramway business—Municipal trading - - - - - **781**
See CORPORATION. 2.

COVENANT — For renewal — Underlease — Personal covenant — Perpetuity — Assignee of reversion - - **54**
See LANDLORD AND TENANT. 2.

—— To settle after-acquired property—Legacies—Deduction of duty - - **708**
See SETTLEMENT. 2.

CREDITOR — Bankruptcy — Fraudulent preference—Surety - - - **77**
See COMPANY. 15.

CREDITOR—*continued.*
—— Company—Winding-up—Petition—Creditor with debt payable at a future date **453**
See COMPANY. 21.

—— Priorities—Voluntary debt—Insolvent estate—Bankruptcy rule - - - **9**
See ADMINISTRATION. 2.

—— Secured—Garnishee order—Application of law of bankruptcy - - - **950**
See COMPANY. 22.

CROWN—*Bona Vacantia—Escheat—Legal Devise to one for Life with no Devise over—Death of Testator without Heirs—Sale under Settled Land Acts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 2; *s.* 22, *sub-s.* 5.

Land was devised by an owner in fee simple to one for life with no devise over. The testator died in 1882, without an heir. The land was sold by the tenant for life under the powers of the Settled Land Acts, and a fund representing the proceeds of sale remained in the hands of trustees appointed for the purposes of the Acts. On the death of the tenant for life:—

Held, that the fund was a money fund which vested in the Crown as bona vacantia.

Taylor v. *Haygarth*, (1844) 14 Sim. 8, distinguished. *In re* BOND. PANES *v.* ATTORNEY-GENERAL - - - **Kekewich J. 15**

CUSTODY—Title-deed—Lease—Surrender **256**
See LEASE.

CUSTOM—Ancient demesne—Fine on alienation—Foreigner—Evidence—Prescription.
See MANOR. **842**

DAMAGES—Measure of—Infringement of patent
See PATENT. 2. **122**

DEATH DUTIES - - - - **691**
See REVENUE.

DEBENTURES—Memorandum of association—Ultra vires—Sale of business to another company—Dissenting debenture-holders, Rights of - - - - **326**
See COMPANY. 8.

—— Winding-up petition—Creditor with debt payable at a future date—Debenture stockholder's petition - - **453**
See COMPANY. 21.

DEBTORS ACT—Writ of attachment—Actual receipt—Evidence - - - **447**
See ATTACHMENT.

DECEIT—Action of — Get-up — Passing off — Evidence—Probability of deception—Inspection—View by judge - **135**
See PRACTICE. 2.

DEDICATION—Roadside waste—Presumption—Evidence - - - - **873**
See HIGHWAY.

DEED—Title-deed—Custody—Lease—Surrender
See LEASE. **256**

DELAY—Solicitor — Undertaking — Proceeding with action—Attachment - **467**
See PRACTICE. 6.

DEMURRER—Proceeding in lieu of—Right to begin—Practice - - - 894
See MARKET.

DEPOSIT—Lien for—Alienation of building estate with notice of contract—Rescission of contract by purchaser - 911
See VENDOR AND PURCHASER. 3.

DEROGATION FROM GRANT—Light—Implication—Reasonableness—Plan shewing building line - - - 834
See EASEMENT.

DEVISE.
See Cases under WILL.

DIRECTOR—Fiduciary relation—Conflict of interest with duty—Contracts with company - - - - 746
See COMPANY. 2.

—— Quorum—Breach of regulations by directors—Validity of acts as regards third parties - - - - 115
See COMPANY. 3.

—— Vacating office by absence for specified period—Time—Remuneration - 728
See COMPANY. 4.

DISCHARGE—Incumbrance—Expenses of making street—Charge on premises——Payment by owner - - 689
See SETTLED LAND. 2.

DISCLAIMER—Trade-mark—Double registration—Non-essential particulars—Time.
See TRADE-MARK. 1. 382

DISCONTINUANCE—Stay proceedings till cost of discontinued action by company paid, Application to—Contributory—Enforcing payment of calls - - 97
See COMPANY. 18.

DISQUALIFICATION—Voting—Purchaser of forfeited shares disqualified from voting whilst calls remain due from original holder - - - - 184
See COMPANY. 14.

DISTRESS—*Patented Chattel—Seizure and Sale under Distress for Rent—Right of Purchaser to use the same—Injunction—Distress Act*, 1689 (2 *Will. & M. Sess.* 1, *c.* 5), *s.* 2.

The right which the owner of a patented chattel has under his letters patent of making and using the patented chattel and licensing others to use the same, is a right of an incorporeal nature. It is a chose in action, at any rate not in possession, distinct from the right of property in the chattel itself, and incapable of seizure under a distress for rent.

Where, therefore, a patented chattel on the premises of a licensee was seized by the landlord of the licensee under a distress for rent, and sold under 2 Will. & M. Sess. 1, c. 5, to a purchaser who bought it with notice of the conditions on which the licensee had it, an injunction was granted at the instance of the patentee restraining the purchaser from using the chattel. BRITISH MUTOSCOPE AND BIOGRAPH COMPANY, LIMITED *v.* HOMER - - Farwell J. 671

DISTRIBUTION—Of assets—Attorney - 230
See ADMINISTRATION. 1.

DISTURBANCE—Statutory market—Injunction—Jurisdiction - - - 894
See MARKET.

DIVIDEND—Accretion to capital—Capital or profits - - - - 208
See COMPANY. 5.

—— Payment of—Profits available for dividend—Setting apart reserved fund—Articles partly excluding Table A - 174
See COMPANY. 6.

DOMICIL—Personal property—Settlement—Power of appointment—Will - 547
See CONFLICT OF LAWS.

DRAINS.
See SEWERS.

DRAMATIC COPYRIGHT—Infringement—"Printed or cause to be printed"—Agent - - - - 374
See COPYRIGHT.

DURATION—Annuity to wife "so long as she remains unmarried"—Death of wife unmarried—Will - - - 412
See ANNUITY.

DUTY—Estate duty—Incidence - - 691
See REVENUE.

EASEMENT—*Light—Derogation from Grant—Implication—Reasonableness—Plan shewing Building Line—Plots sold for Building—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

Where a landowner contracts to grant a lease of a vacant piece of land when a house of a specified character is built thereon, and accordingly a house is built and a lease of the house and land is granted, the doctrine that a grantor cannot derogate from his own grant must be applied, not to the vacant piece of land, but to the land with the house on it according to the contract, which must be taken for this purpose to have been fulfilled.

If the land forms part of a building estate, and the contract is entered into by reference to a plan in which the estate is marked out in building plots, with a building line marked on the plan so as to extend through all the plots, including the land which is the subject of the contract, the application of the doctrine is not thereby limited or restricted, and, in the absence of further evidence of the existence of a building scheme, or of any reservation of right to the grantor, the purchaser from him of an adjoining plot will be restrained from building on his land so as to interfere with the access of light to the house as theretofore enjoyed.

Broomfield v. *Williams*, [1897] 1 Ch. 602, applied. POLLARD *v.* GARE - Kekewich J. 834

ELDEST SON—Exception of, entitled to other estates—Shifting clause—Successive life estates - - - - 819
See WILL. 13.

ELECTION—*Married Woman—Restraint on Anticipation—Removal of Disability—Compensation.*

A testator, who owned land in Turkey, by his will directed it to be sold and the proceeds treated

ELECTION—*continued.*

as part of his residuary estate, and he gave an interest in his residuary estate to a married daughter coupled with a restraint upon anticipation. By the law of Turkey the testator had no power to dispose by will of the proceeds of sale of the Turkish property which became divisible amongst his children. Pending an application for payment out of court of the proceeds of sale, the married daughter became a widow:—

Held, that the testator by adding the restraint on anticipation shewed an intention inconsistent with the application of the doctrine of election, and that that intention was not affected by the fact that the daughter had subsequently become discovert:

Held, therefore, that she was not bound to compensate out of her interest in the residue those who were disappointed by the Turkish property not being dealt with as directed by the will.

Hamilton v. *Hamilton*, [1892] 1 Ch. 396, commented upon. HAYNES *v.* FOSTER
Kekewich J. 361

ELECTRIC LIGHTING — Contract — Validity—Corporation shareholders — City of London - - - - 602
See CORPORATION. 1.

EQUITABLE TENANCY IN COMMON—Merger—Legal joint tenancy - - 921
See MERGER.

ESCHEAT—Bona vacantia — Death of testator without heirs—Sale under Settled Land Acts - - - - - 15
See CROWN.

ESTATE DUTY — Incidence — Will exercising power of appointment—Appointed fund—Residue - - - - 691
See REVENUE.

EVIDENCE—*Presumption — Child-bearing—Impossibility of Issue—Woman past Child-bearing—Widow who has had a Child.*

A widow, aged fifty-six years and three months, who had never had but one child (born when she was between twenty-one and twenty-two years of age), and lived afterwards with her husband for twenty-four years until his death, presumed to be past child-bearing.

The principle of the cases in which spinsters have been presumed to be past child-bearing applies also to widows who have had children. *In re* WHITE. WHITE *v.* EDMOND
Buckley J. 570

—— Deceit—Action of—Probability of deception—Inspection—View by judge - 135
See PRACTICE. 2.

—— Intention—Mistake—Number of legatees—Illegitimate children—Presumption 404
See WILL. 7.

—— Limited power—Exercise by will—"Appoint, devise, and bequeath" - - 677
See POWERS.

—— Parol—Rectification—Marriage settlement—Mistake—Statute of Frauds - 28
See SETTLEMENT. 4.

EVIDENCE—*continued.*

—— Roadside waste—Dedication—Presumption
See HIGHWAY. 873

—— Trustee ordered to pay into court money in possession or under control — Actual receipt—Writ of attachment - 447
See ATTACHMENT.

—— Voting—Show of hands—Declaration of chairman that resolution is carried—"Conclusive evidence" - - 518
See COMPANY. 7.

EXECUTION—Limited power—Exercise by will—"Appoint, devise, and bequeath"—Sufficient reference - - 677
See POWERS.

EXECUTOR—*Appropriation of Specific Assets—Legacy—Residue — Leaseholds—Settled Shares—Sale and Conversion—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 4, *sub-s.* 1.

The principle upon which executors and trustees under a will which contains a trust for sale and conversion have power to appropriate any specific part of the residuary estate towards satisfaction of a legacy or share of the residue, is that they have power to sell the particular asset to the legatee, and to set off the purchase-money against the legacy. The doctrine, therefore, is not confined to pure personal estate, but extends to chattels real, and (*semble*) to real estate which is subject to a trust for sale and conversion.

Sect. 4, sub-s. 1, of the Land Transfer Act, 1897, applies to personal estate as well as to real estate; but it does not, where there is a trust for sale and conversion, take away the former power of appropriation. *In re* BEVERLY. WATSON *v.* WATSON - - - - Buckley J. 681

—— Partnership—Conversion into company—Agreement by executors—Jurisdiction to sanction - - - - 701
See WILL. 8.

FIDUCIARY RELATION—Director—Conflict of interest with duty — Contracts with company - - - - 746
See COMPANY. 2.

FILING CONTRACT—Omission—Relief by Court—Jurisdiction - - - 637
See COMPANY. 13.

FINANCE ACT—Estate duty - - 691
See REVENUE.

FINE — On alienation — Ancient demesne — Custom — Foreigner — Evidence — Prescription - - - - 842
See MANOR.

FIXTURES — *Tapestries — Right of Removal — Tenant for Life and Remainderman—Costs—Shorthand Notes of Judgment.*

Chattels (such as tapestries) affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels are, as against the remainderman, removable by the tenant for life, or by his executor after his death, even though they have been fixed as firmly as they would have been if it had been intended to annex them permanently to the freehold.

FIXTURES—*continued.*

The purpose of the annexation is to be inferred from the circumstances of each case.

Tapestries purchased by the tenant for life of freehold estates were affixed by her to the walls of the drawing-room in the mansion-house. Strips of wood were placed over the paper which covered the walls, and were fastened by nails to the walls. Canvas was then stretched over the strips of wood and nailed to them, and the tapestries were then stretched over the canvas and fastened by tacks to it and the pieces of wood. Mouldings, resting on the surface of the wall and fastened to it, were placed round each piece of tapestry. Portions of the walls which were not covered by the tapestries were covered with canvas which was coloured or painted so as to harmonise with the tapestries:—

Held, that the tapestries had been thus affixed for the purpose of ornamentation and the better enjoyment of them as chattels, and that on the death of the tenant for life they did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life and could be removed by her executor:

Held, also, that the executor ought to pay the expense of making good the damage done in removing the tapestries, but that he was not bound to pay the cost of redecorating the room.

Decision of Byrne J. reversed.

Per Rigby L.J.: *D'Eyncourt* v. *Gregory*, (1866) L. R. 3 Eq. 382, disapproved.

Norton v. *Dashwood*, [1896] 2 Ch. 497, explained and distinguished.

The costs of a shorthand writer's notes of a judgment appealed from are included in the costs of the appeal without any special order of the Court. *In re* De Falbe. Ward *v.* Taylor **C. A. 523**

FOREIGN COMMITTEE — English lunatic — English property - - - **666**
See Lunacy. 1.

FORFEITURE—Act of bankruptcy—Adjudication—Date of vesting - - **435**
See Bankruptcy.

—— Garnishee order—Gift of income to A. for life or until alienation - - **887**
See Will. 5.

—— Relief of underlessee against — Solvent company—Voluntary liquidation—Discretion of Court - - - **499**
See Landlord and Tenant. 1.

—— Shares—Voting—Disqualification - **184**
See Company. 14.

FORGERY—Attorney innocently acting under forged power—Liability to third party
See Principal and Agent. 2. **652**

FRAUD — "Concealed fraud" — Third party — Innocent possession - - **143**
See Limitations, Statute of.

—— Mortgagor's solicitor—Priority of mortgagor and subsequent transferee - **213**
See Mortgage. 3.

—— Shares—Compulsory transfer at specified price in event of shareholder's bankruptcy—Fraud on bankruptcy law **279**
See Company. 12.

FRAUDS, STATUTE OF—Marriage settlement—Mistake—Rectification—Parol evidence
See Settlement. 4. **28**

—— Written offer containing two alternatives—Verbal acceptance of one—Agreement to let from year to year - - **543**
See Specific Performance.

FRAUDULENT PREFERENCE — Company — Winding-up - - - **250**
See Company. 19.

—— Surety—"Creditor"—Bankruptcy - **77**
See Company. 15.

FUND IN COURT— Payment out to person not entitled—Stop order—Liability to replace fund - - - - **460, 464, n.**
See Practice. 3, 4.

GARNISHEE ORDER—Forfeiture clause—Gift of income to A. for life or until alienation - - - - - **887**
See Will. 5.

—— Secured creditor — Application of law of bankruptcy - - - **950**
See Company. 22.

GRANT—Light—Derogation from grant—Implication—Reasonableness—Plan shewing building line - - - **834**
See Easement.

HABENDUM—Words of limitation—Habendum to grantee "in fee"—Supplying omission from context - - - **945**
See Conveyance.

HIGHWAY—*Roadside Waste—Dedication—Presumption—Evidence.*

Where there are uninclosed spaces by the sides of a metalled highway there is no invariable presumption that the highway extends to the fence on either side.

The nature of the district, the width and level of the margins, and the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication. Countess of Belmore *v.* Kent County Council **Cozens-Hardy J. 873**

—— Prescription—Pasturage—Profit a prendre—Surveyor of highways—Unallotted land
See Inclosure. **22**

HUSBAND AND WIFE—*Will—Married Woman—Invalid Bequest—Assent of Husband—Administration with Will Annexed—Assent given after Wife's Death—Construction—"All I have Power to dispose of by this my Will"—No Power to dispose except with Husband's Assent.*

In order to make the will of a married woman valid as a disposition of property which she has no power to dispose of without her husband's assent, it is not necessary that his assent should be given during her life: assent given after her death is sufficient.

Ex parte Fane, (1848) 16 Sim. 406, followed.

A married woman entitled to a reversionary interest, and having under a settlement a power of appointment over other property but not over

HUSBAND AND WIFE—*continued.*
the reversionary interest, made a will whereby she appointed the settlement funds "and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will" to certain persons. Her husband did not assent to her will during her life, but after her death he gave his assent, in a form which recited that he was entitled to his wife's personal estate over which she had no disposing power, to administration with the will annexed being granted in general form to the executors therein named:—

Held, that the assent of the husband given after his wife's death would have been sufficient to make her will a valid disposition of the reversionary interest if she had purported to dispose of it; but that, as a matter of construction, the gift in the will did not include that interest, and that the husband had not assented to the will as dealing with it. ELLIOT *v.* NORTH **Buckley J. 424**

—— Election—Compensation — Married woman —Restraint on anticipation—Removal of disability - - - - **361**
See ELECTION.

—— Marriage settlement.
See Cases under SETTLEMENT.

ILLEGITIMATE CHILDREN—Number of legatees—Mistake—Presumption—Evidence of intention - - - - **404**
See WILL. 7.

IMPROVEMENT—Capital money—New floor—Alterations with a view to letting **440**
See SETTLED LAND. 1.

INCLOSURE—*Unallotted Land—Adjoining Owner — Lord of the Manor—Prescription — Profit a Prendre—Pasturage—Surveyor of Highways.*

An Inclosure Act provided for the allotment of land to the lord of the manor in compensation for all right of soil:—

Held, that the soil of land set out as a private road in pursuance of the Act was vested in the allottees of the adjacent land ad medium filum.

The herbage of a road was by an inclosure award made in 1822 allotted to the surveyor of highways to be let for depasturing sheep, in aid of rates. For more than fifty years the surveyor had let the pasturage for cattle and horses. The Court presumed an enlargement of the right to depasture by grant or release from the owners of the soil to the surveyor. NEAVERSON *v.* PETERBOROUGH RURAL DISTRICT COUNCIL
Cozens-Hardy J. 22

INCUMBRANCE—Street, Expenses of making—Charge on premises—Payment by owner
See SETTLED LAND. 2. **689**

INFANT—*Trustees, Appointment of—Practice—Management of Land during Minority—Infant taking by Descent—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 42, *sub-s.* 1.

Sect. 42, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to

INFANT—*continued.*
the possession of any land, applies to the case of an infant taking by descent.

In re Glover, [1899] 1 I. R. 337, followed. *In re* COWLEY - - - **Cozens-Hardy J. 38**

—— Borrowing member—Mortgage for advances —Repudiation on attaining twenty-one
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—— Maintenance — Allowance for up-keep of family mansion—Subscriptions to local charities - - - - **879**
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—— Solicitor — Costs — Lien — Compromise — Judgment—Form of order - **317**
See SOLICITOR. 1.

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—— Patent—Costs—"Subsequent action" **414**
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—— Patent—Innocent purchaser—Exposing for sale—"Using and vending" the invention—Measure of damages - **122**
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—— Noxious trade—Reasonable use of premises
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—— Patented chattel—Sale under distress for rent—Right of purchaser to use the same - - - - - **671**
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—— Statutory market—Disturbance—Jurisdiction - - - - - **894**
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INN—Forfeiture—Relief of underlessee against — Rent — Tied house — Discretion of Court - - - - **499**
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INNOCENT POSSESSION—"Concealed fraud"—Third party - - - - **143**
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INNOCENT PURCHASER — Infringement of patent—Exposing for sale—"Using and vending" the invention - - **122**
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INTEREST—Legacy—Gift by appointment under a power - - - - 370
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INTERLOCUTORY INJUNCTION—Motion by defendant before pleading - - 812
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See PRACTICE. 1.

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INVESTMENT—Charity land—Compulsory sale—Payment into court—Interim investment—Costs - - - 228
See LANDS CLAUSES ACTS. 3.

—— Lands Clauses Acts—Annuitant in possession—Reversioner unknown - 931
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—— Lands Clauses Acts—Interim investment—Costs—Brokerage and other charges 923
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JOINT TENANCY—Merger—Equitable tenancy in common—Legal joint tenancy 921
See MERGER.

JOINTURE—Power to appoint jointure "to any woman whom he may marry"—Second marriage after divorce at instance of first wife - - - - - 165
See SETTLEMENT. 3.

JUDGE—View by—Action of deceit—Evidence—Inspection—Probability of deception 135
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JURISDICTION—Compromise—Power of Court to bind absent persons—Extent of jurisdiction - - - - 769
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—— Costs — Conditions of sale — Rescission — Pending litigation - - - 908
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—— Lunacy, Master in—Vesting order—Trust property - - - - 3
See LUNACY. 3.

—— Shares paid for otherwise than in cash—Omission to file contract — Relief by Court - - - - 637
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—— Statutory market—Disturbance—Injunction
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—— To wind up illegal company—Unincorporated society—Repeal of statute under which certified - - - 102
See BUILDING SOCIETY. 2.

LAND TRANSFER—Appropriation of specific assets—Leaseholds — Settled shares — Sale and conversion - - 681
See EXECUTOR.

LANDLORD AND TENANT—*Lease—Forfeiture—Limited Company—Re-entry on Liquidation, Condition for — Solvent Company — Voluntary Liquidation—Underlease—Relief of Underlessee against Forfeiture—Rent—Tavern—Public-house—Tied House—Discretion of Court—Lessor and Lessee—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 2 (*xv.*); *s.* 14, *sub-ss.* 1, 2, 3, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 2; *s.* 4.

In granting relief under s. 4 of the Conveyancing and Law of Property Act, 1892, to an underlessee against the forfeiture of the head-lease, the Court has, under that section, the most ample discretion in fixing the terms, covenants and conditions, as to rent and otherwise, of the new lease vesting in the underlessee the property, or any part thereof, comprised in the head-lease—a discretion which is to be exercised having regard to all the circumstances of the case (including the circumstance that the forfeiture has operated to vest in the original lessor the whole of the rights in the demised premises), unfettered by any limitation except that contained in the latter part of the section, namely, that the underlessee shall not be entitled to require a lease for a longer term than he had under his original sub-lease.

A lease of a tavern was granted to a limited brewery company for a term of thirty years at a yearly rent of 300*l.*, with a condition for re-entry if the lessees "should enter into liquidation either compulsory or voluntary." On the same day the company granted an underlease of the tavern to a publican for a term of twenty-nine and a quarter years at a yearly rent of 800*l.*, reducible to 300*l.* so long as he got his beer from the company.

Subsequently the company, which was perfectly solvent, went into voluntary liquidation for the sole purpose of amalgamation with two other solvent brewery companies, so as to form one new brewery company, and assigned the original lease to that new company. Thereupon the original lessor, claiming that the voluntary liquidation of the original lessee company had occasioned a forfeiture of the lease, brought an action against the underlessee and the new company to recover possession of the tavern. The underlessee then counter-claimed under s. 4 of the Conveyancing and Law of Property Act, 1892, for relief against the forfeiture (if any), and insisted that the rent to be payable under any new lease which might be granted to him under the section should be no larger than that fixed by his original underlease:—

Held, by Kekewich J. and by the Court of Appeal, that the voluntary liquidation of the lessee company had occasioned a forfeiture of the original lease: *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. 79; and that the Court, in fixing the terms of the new lease to be granted to the underlessee under s. 4, had power to vary the rent which had been reserved by the original underlease, having regard to the circumstance

LANDLORD AND TENANT—*continued.*

that the tavern, by reason of the forfeiture of the original lease and the consequent destruction of the underlease, had ceased to be a tied house. EWART *v.* FRYER - - - **C. A. 499**

2. —— *Lease — Underlease — Covenant for Renewal—Personal Covenant—Covenant Running with Land—Perpetuity—Assignee of Reversion—* 32 *Hen.* 8, *c.* 34, *s.* 2.

D. A., who was sub-lessee of certain premises, demised the same to F. for the residue of the term then vested in him less the last days thereof, and covenanted for himself, his executors, administrators and assigns, that in case he should obtain from the freeholder, his heirs or assigns, any extension of the term for which he then held the premises, then he, his executors, administrators or assigns, would grant to F. a new lease for such extended term as would include the unexpired residue of the original term granted to F., and the further term, less the last days thereof, which might be granted to D. A. by the freeholder, his heirs or assigns. D. A. died, and his reversion became vested in the defendant, who surrendered his term to the freeholder and obtained from him a new lease for an extended term, subject to existing underleases. F. having died, the plaintiff acquired from his executors his interest in the premises, and then claimed specific performance of D. A.'s covenant with F. :—

Held, (1) on the construction of the covenant, that it was personal to D. A. alone, and did not bind his representatives; (2) that the covenant was not strictly a covenant for renewal, and did not on that account run with the land; but, assuming that it did run with the land, the doctrine of perpetuity had no application; and (3), following *Brereton* v. *Tuohey*, (1858) 8 Ir. C. L. Rep. 190, *Kent* v. *Stoney*, (1859) 9 Ir. Ch. Rep. 249, and *Coey* v. *Pascoe*, [1899] 1 I. R. 125, that the covenant ran with the reversion which was vested in the covenantor at the time when he entered into the covenant; and, consequently, that the statute 32 Hen. 8, c. 34, s. 2, did not apply. On these grounds the action was dismissed. MULLER *v.* TRAFFORD - **Farwell J. 54**

—— Advertising station—Tenancy from year to year—Licence—Revocation—Notice
See AGREEMENT. **578**

—— Agreement to let from year to year—Written offer containing two alternatives—Verbal acceptance of one - - - **543**
See SPECIFIC PERFORMANCE.

LANDS CLAUSES ACTS—*Compulsory Purchase of Land—Property held for Term to secure Annuity for Lives—Cesser of Term on dropping of last Life—Annuitant in Possession—Reversioner unknown—Investment of Purchase-money—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 79.

By indenture dated September 1, 1810, A. H. covenanted to pay to S. H., his executors, administrators and assigns, during the lives of nine persons and the lives and life of the survivors and survivor of them, an annuity of 100*l.*, and for better securing the annuity A. H. demised certain premises to S. H. for the term of 200 years upon trust, in case default should be made in payment of the annuity, that S. H., his executors, administrators and assigns, should out of the rents and profits, or by selling, demising, or mortgaging the premises, raise sufficient to satisfy the annuity and suffer A. H., her heirs and assigns, to receive the residue of the rents and profits for their own use and benefit; provided that, after the termination of the annuity by the dropping of the last life, the trusts aforesaid should cease. Default was made in the payment of the annuity, and from 1829 to 1900 S. H. and his successors in title had been in continuous receipt of the rents of the premises, and the surplus over and above the amount of the annuity had been retained by the person for the time being entitled to the annuity without any claim on the part of any reversioner. The last life dropped on May 31, 1895. In 1900 the premises were compulsorily acquired by the London County Council, who paid the purchase-money into court. Upon a petition by the successor in title of S. H. for payment out, the Court declined to order the fund to be paid out, but directed it to be invested and the dividends to be paid to the petitioner until the lapse of twelve years from May 31, 1895, or further order. *In re* HARRIS. *Ex parte* LONDON COUNTY COUNCIL - - **Joyce J. 931**

2. —— *Corporation — Railway Company — Promoters — Landowner — Notice to Treat — Counter-notice—Withdrawal of Notice to Treat—Successive Notices to Treat—Compensation—Arbitration — Compulsory Powers, Exhaustion of — Ultra vires—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 92.

The compulsory powers of promoters, under s. 18 of the Lands Clauses Consolidation Act, 1845, to purchase land of a particular landowner, are not exhausted by a single notice to treat for part of his land. If that notice is validly withdrawn, as it may be, for instance, upon a counter-notice by the landowner under s. 92 to take the whole of his land, the promoters are in the same position as if no notice to treat had been given, and may therefore give a second notice in respect of the land comprised in the first notice, or any part thereof, and, upon that being validly withdrawn, may give a third notice, and so on during the time limited by their special Act for the exercise of compulsory powers; the result being that they are entitled to proceed to the assessment of compensation upon the latest notice to treat not validly withdrawn. ASHTON VALE IRON COMPANY *v.* BRISTOL CORPORATION. SAME *v.* SAME - - - - - **C. A. 591**

3. —— *Costs — Compulsory Sale — Payment into Court—Interim Investment—Charity Land—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 80.

The price of charity land taken compulsorily by a corporation was settled by arbitration. The corporation, after tendering the purchase-money to the official trustees of charitable funds, paid it into court. The corporation was ordered to pay the costs of a petition for investment. *In re* LEEDS GRAMMAR SCHOOL **Cozens-Hardy J. 228**

4. —— *Costs—Practice — Purchase-money in Court—Interim Investment—Brokerage and other Charges—Railway Stock—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 70, 80—

LANDS CLAUSES ACTS—*continued.*

Rules of Supreme Court, 1883, *Order XXII., r.* 17 (1) (1888)—*Form of Order considered.*

The costs payable by the promoters for an interim investment of money paid into court under the Lands Clauses Act, 1845, in any of the securities sanctioned by the Court, include the increased cost of brokerage and other charges occasioned by an investment in railway stock.

Form of order discussed. *In re* GASELEE **Buckley J. 923**

LAPSE—Share of residue—Gift over—Legacy out of share - - - - **408**
See WILL. 11.

LEASE—*Surrender—Title-deed—Custody.*

On the surrender of a term and the grant of a longer term to the same lessee, the lessee is entitled to retain the original lease. KNIGHT *v.* WILLIAMS - - **Cozens-Hardy J. 256**

—— Capital money, Application of — Leasing powers—Charges of estate agent for procuring lease - - - **934**
See SETTLED LAND. 4.

—— Costs—Taxation—Preliminary negotiations —Third party - - - **239**
See SOLICITOR. 3.

—— Landlord and tenant - - - **499**
See LANDLORD AND TENANT. 1.

—— Power of leasing—Bonâ fide exercise **574**
See SETTLED LAND. 3.

LEASEHOLDS—Appropriation of specific assets— —Settled shares—Sale and conversion —Land Transfer Act - - **681**
See EXECUTOR.

—— Insurance—Will—Accumulation - **697**
See ACCUMULATIONS.

LEGACY—Will—Construction.
See Cases under WILL.

LIBERTY OF SUBJECT—Appeal, Leave to— Interlocutory order—Refusal to commit
See PRACTICE. 1. **1**

LICENCE—Advertising station—Tenancy from year to year—Licence — Revocation— Notice - - - - **578**
See AGREEMENT.

—— Association not for profit—Alteration of memorandum — Consent of Board of Trade - - - - **556**
See COMPANY. 10.

LIEN—Costs—Solicitor — Infants — Compromise —Judgment—Form of order - **317**
See SOLICITOR. 1.

—— For deposit—Alienation of building estate with notice of contract—Rescission of contract by purchaser - - **911**
See VENDOR AND PURCHASER. 3.

LIGHT—Derogation from grant—Implication— Reasonableness—Plan shewing building line - - - - - **834**
See EASEMENT.

LIGHTING — Contract — Validity — Corporation shareholders—City of London—Electric lighting - - - - **602**
See CORPORATION. 1.

LIMITATION, WORDS OF — Habendum to grantee "in fee"—Supplying omission from context - - - **945**
See CONVEYANCE.

LIMITATIONS, STATUTE OF — "*Concealed Fraud*"—*Third Party—Innocent Possession—Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 26—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1.

Per Lord Alverstone C.J. and Vaughan Williams L.J.: The "concealed fraud" which, by s. 26 of the Real Property Limitation Act, 1833, will prevent time running against the true owner of real estate must be the fraud of the person who sets up the statute, or of some one through whom he claims.

Per Rigby L.J.: Sect. 26 applies to every case of a "concealed fraud" which deprives the true owner of the possession of land, except as regards a bonâ fide purchaser for value without notice of the fraud at the time of his purchase.

In September, 1884, a husband conveyed a freehold house to his wife in fee, and in the same month she executed a conveyance of the house to their daughter in fee. The mother did not inform her daughter of the conveyance, and there was evidence that she purposely concealed it from her. In 1888 the mother died, and in 1899 the father died, having by his will devised and bequeathed all his property to the defendant. The father had continued in possession of the house after the conveyance to his wife and down to the time of his death, and on his death the defendant entered into possession of the house. There was no evidence that the father had any knowledge of the mother's conveyance to the daughter. After his death she was for the first time informed of her title to the house, and she brought an action to recover possession of it from the defendant:—

Held, by Lord Alverstone C.J. and Rigby L.J. (Vaughan Williams L.J. doubting), that there had been a "concealed fraud" by the mother within the meaning of s. 26 of the Real Property Limitation Act, 1833.

But, *held*, by Lord Alverstone C.J. and Vaughan Williams L.J. (Rigby L.J. dissenting), that, if there had been a "concealed fraud" by the mother, yet, as the defendant, and the father through whom she claimed, were not party or privy to the commission of the fraud, s. 26 did not prevent the plaintiff's right from being barred by the statute:—

Held, by Rigby L.J., that, as the plaintiff had been deprived of her estate by means of the concealed fraud, s. 26 prevented her right from being barred by the lapse of time.

Decision of Kekewich J. reversed.

Petre v. *Petre*, (1853) 1 Drew. 371, considered. *In re* MCCALLUM. MCCALLUM *v.* MCCALLUM **C. A. 143**

—— Superfluous land—Tunnel—Space above usque ad cœlum—Telegraph wires **738**
See RAILWAY.

LIQUIDATOR — Application to remove — Circularising shareholders—Contempt of Court - - - - **860**
See COMPANY. 20.

LITIGATION—Pending—Conditions of sale—Recission—Costs—Jurisdiction - 908
See VENDOR AND PURCHASER. 2.

LOCAL GOVERNMENT—Sewers—Prescriptive right of drainage—Trade effluent 645
See SEWERS.

LONDON — Common — Scheme for regulation under Metropolitan Commons Acts—Limits of common—Binding effect of scheme - - - 387, 389, n.
See COMMON. 1, 2.

—— Contract — Validity — Corporation shareholders—Electric lighting - 602
See CORPORATION. 1.

LOSS — Apportionment — Unauthorized investment - - - - - 916
See TENANT FOR LIFE AND REMAINDERMAN.

LUNACY—*Foreign Committee—English Lunatic—English Property.*

A foreign committee of the property of a domiciled Englishman, resident abroad and found to be a lunatic in the forum of his residence, cannot as of right recover personal property of the lunatic in this country.

The widow of a domiciled Englishman, who and whose relatives resided in New York, was found on a New York inquisition to be insane. A New York tribunal appointed a company committee of both the person and property of the lunatic.

The Court, in its discretion, though the lunatic's income was more than sufficient for her maintenance, ordered English trustees of personal property of the lunatic to pay accrued income, and gave the trustees liberty to pay future income to the committee.

Didisheim v. *London and Westminster Bank*, [1900] 2 Ch. 15, considered. NEW YORK SECURITY AND TRUST COMPANY *v* KEYSER
Cozens-Hardy J. 666

2. —— *Pauper Lunatic — Maintenance — Receiver—Debt—Death of Lunatic—Administration Action—Creditors, Rights of—Jurisdiction.*

A pauper lunatic, while being maintained by the guardians of a union, became entitled to a fund, whereupon, on a summons in Lunacy by the guardians, who claimed six years' arrears for past maintenance, an order was made by the Court in Lunacy appointing a receiver of the fund, and directing him to pay thereout to the guardians part of the arrears, and to apply the balance for future maintenance. While under the care of the guardians the lunatic died. There then being a surplus in the hands of the receiver, the guardians commenced a creditors' administration action in the Chancery Division against the lunatic's administrator to obtain payment of the balance of the six years' arrears:—

Held, reversing the decision of Kekewich J., that the balance of arrears was a valid legal debt enforceable after the lunatic's death, and that the order in Lunacy was no bar to the action. *In re* TAYLOR. EDMONTON UNION *v.* DEELY
C. A. 480

3. —— *Vesting Order—Jurisdiction of Master—Trust Property—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116–130, 136—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 1.

A Master in Lunacy has not jurisdiction to make a vesting order as to trust property which, new trustees having been already appointed, remains vested in the old trustees, one of whom is a lunatic.

A vesting order in such a case is not part of the administration or management of the lunatic's estate within s. 27, sub-s. 1, of the Lunacy Act, 1891, which confers jurisdiction on a master.

In re Fuller, [1900] 2 Ch. 551, distinguished. *In re* LANGDALE (A LUNATIC) - - C. A. 3

MAINTENANCE — Pauper lunatic—Receiver—Debt — Death of lunatic — Creditors, Rights of—Jurisdiction - - 480
See LUNACY. 2.

—— Infant—Allowance for up-keep of family mansion—Subscription to local charities
See SETTLED ESTATES. 879

MANDATORY INTERLOCUTORY INJUNCTION —Motion by defendant before pleading
See PRACTICE. 5. 812

MANOR—*Ancient Demesne—Freehold—Custom—Fine on Alienation—Foreigner—Evidence—Prescription — Statute Quia Emptores Terrarum* (18 *Edw.* 1, *c.* 1).

The freehold of land held in socage of a manor of ancient demesne is in the tenant.

A manorial custom in a manor of ancient demesne to exact a fine on alienation to a foreigner (of arbitrary amount in its origin) held bad, under the Statute Quia Emptores Terrarum and otherwise, as being a restriction on the right of a freeman to alienate.

The plaintiff sued as lord of a manor and soke in ancient demesne, formerly vested in Henry VIII. The present existence of and the plaintiff's title to the manor and soke were disputed. The rolls of courts held on behalf of the plaintiff's predecessors going back to 1576 were produced.

The Court *held* the plaintiff's title to the manor established, if necessary by the presumption of a lost grant. MERTTENS *v.* HILL
Cozens-Hardy J. 842

MARKET — *Statutory Market — Disturbance — Statutory Remedy — Injunction — Jurisdiction—Practice — Proceeding in Lieu of Demurrer—Right to begin—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 2.

Where a statute provides a particular remedy for the infringement of a right of property thereby created or re-enacted, the jurisdiction of the High Court to protect that right by injunction is not excluded, unless the statute expressly so provides.

On a proceeding in lieu of demurrer under Order XXV., r. 2, the party who by his pleading raises the point of law has the right to begin. STEVENS *v.* CHOWN. STEVENS *v.* CLARK
Farwell J. 894

MARRIAGE SETTLEMENT.
See Cases under SETTLEMENT.

MARRIED WOMAN—Election—Compensation—Restraint on anticipation—Removal of disability - - - - 361
See ELECTION.

—— Will—Invalid bequest—Assent of husband
See HUSBAND AND WIFE. 424

MEETINGS—Company—Winding-up — Committee of inspection—Creditors unrepresented—Resummoning first meetings
See COMPANY. 17. 735

—— Voting—Show of hands—Declaration of chairman that resolution is carried—"Conclusive evidence" - - 518
See COMPANY. 7.

MEMORANDUM OF ASSOCIATION—Alteration of—Association not for profit—Licence—Consent of Board of Trade - 556
See COMPANY. 10.

—— Sale of business to another company—Ultra vires — Dissenting debenture-holders, Rights of - - - - 326
See COMPANY. 8.

—— Verbal alteration - - - 236
See COMPANY. 9.

MERGER—*Equitable Tenancy in Common—Legal Joint Tenancy.*

Where equitable and legal estates, equal and coextensive, unite in the same persons, the former merges, although the former is a tenancy in common and the latter a joint tenancy.

Selby v. *Alston*, (1797) 3 Ves. 339; 4 R. R. 10, followed and extended. *In re* SELOUS. THOMSON *v.* SELOUS - - - Farwell J. 921

METROPOLITAN COMMONS ACTS—Limits of common—Binding effect of scheme
See COMMON. 1, 2. 387, 389, n.

MISTAKE—Marriage settlement—Non-execution of a power—Death of donee—Rectification—Parol evidence - - 28
See SETTLEMENT. 4.

—— Number of legatees—Illegitimate children—Presumption—Evidence of intention
See WILL. 7. 404

MONEY—Had and received—Agent—Power of attorney — Borrowing — Excess of authority - - - - 261
See PRINCIPAL AND AGENT. 3.

MORTGAGE—*Power of Sale—Chose in Action—Shares in Company.*

Where shares in a commercial company are mortgaged and no time is fixed for payment of the mortgage debt, a mortgagee who has acquired the legal title to the shares has an implied power of sale on the failure of the mortgagor to pay after the lapse of a reasonable time. DEVERGES *v.* SANDEMAN, CLARK & CO. - Farwell J. 70

2. —— *Priority—Chose in Action—Land held by several Persons on Trust for Sale—Mortgage of Beneficial Reversionary Interest of one of Trustees—Absence of Notice to other Trustees—Subsequent Mortgage with Notice to Trustees.*

Land was settled upon trust to sell the same and pay the income to X. for life, and after her death to divide the proceeds among her children, one of whom was P. P., being then one of the

MORTGAGE—*continued.*

three trustees of the settlement, in the lifetime of X. and before the land was sold, mortgaged his share to G., but no notice of this mortgage was given to the other trustees. P. subsequently (concealing the mortgage to G.) mortgaged his share to the plaintiffs, who made inquiry of the trustees as to prior incumbrances, and themselves gave notice of their own mortgage to the trustees.

Held, (1.) that, having regard to the trust for sale, the principle of *Dearle* v. *Hall*, (1823) 3 Russ 1; 27 R. R. 1, applied; (2.) following *Browne* v. *Savage*, (1859) 4 Drew. 635, that the mortgage of the plaintiffs had priority over that of G. LLOYD'S BANK *v.* PEARSON
Cozens-Hardy J. 865

3. —— *Priority—Transfer without Notice to Mortgagor—Payment of Mortgage Debt by Mortgagor—Fraud of Mortgagor's Solicitor—Priority of Mortgagor and subsequent Transferee.*

In 1886 a mortgage debt for 1500*l.* was duly transferred and the mortgaged property was conveyed, by way of security, to F., the plaintiff, the mortgagor, being a party. Several subsequent transfers, to which the plaintiff was not a party, were made, and in February, 1896, the mortgage debt and the security were vested in one Hamp. In 1892 the plaintiff gave Harrison, her solicitor, the money to pay off the mortgage, which he did not do, though he continued to pay interest on the mortgage as it became due to the transferee for the time being. The plaintiff made no inquiry in 1892 for the reconveyance nor for the title-deeds, but left the whole matter in the hands of her solicitor. In October, 1897, Hamp transferred the mortgage debt and the property to Harrison, and the next day Harrison transferred the same to the defendant, to whom the deeds were handed. The cheque for 1500*l.* from the defendant was paid by Harrison into his private account, and the cheque to Hamp was drawn by Harrison on his firm's account, which was then in funds, at another bank. In December, 1899, application was made by the defendant to the plaintiff for arrears of interest, and the fraud was discovered. On an action by the plaintiff to establish her priority over the defendant, and for a reconveyance of the mortgaged property:—

Held, that on the transfer to Harrison the mortgage debt became discharged, and he held the property as trustee for the plaintiff; that the defendant, having taken the transfer from Harrison without the privity of the mortgagor, could only hold it against the mortgagor subject to the state of account between Harrison and the mortgagor, and as between them the debt was non-existent; that the plaintiff had never lost the right to redeem, and that directly the agent, who had received the amount to pay off the mortgage, became himself the transferee, the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge upon the property, and that the plaintiff was therefore entitled to priority and to have a reconveyance from the defendant. TURNER *v.* SMITH
Byrne J. 213

—— For advances—Infant borrowing member—Repudiation - - - 88
See BUILDING SOCIETY. 1.

MORTGAGE—*continued.*

—— Partnership—Dissolution—Sale of share to co-partner — Rights of mortgagee or assignee—Priority - - 294
See PARTNERSHIP. 2.

—— Power of sale—Notice by mortgagor to bank of appointment of a trustee for his creditors—Banker and customer—Closing account - - - 188
See BANKER.

MOTION—By defendant before pleading—Mandatory interlocutory injunction against plaintiff—Order to deliver up possession of a house - - - - 812
See PRACTICE. 5.

MUNICIPAL CORPORATION.
See Cases under CORPORATION.

NOTICE—Mortgages—Priority - - - 865
See MORTGAGE. 2.

—— Revocation — Licence—Advertising station —Tenancy from year to year - 578
See AGREEMENT.

—— Title—Adverse rights—Notice by tenancy
See VENDOR AND PURCHASER. 4. 45

—— To treat—Lands Clauses Act - 591
See LANDS CLAUSES ACT. 2.

NOVATION — Contract — Validity — Corporation shareholders—City of London—Electric lighting - - - - - 602
See CORPORATION. 1.

NOXIOUS TRADE—Injunction—Reasonable use of premises - - - - 205
See NUISANCE.

NUISANCE—*Noxious Trade—Reasonable Use of Premises—Injunction.*

In an action to restrain a nuisance, the question whether the defendant is acting reasonably from his own point of view is not material, and if he is carrying on business so as to cause a nuisance to his neighbours he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner.

Reinhardt v. *Mentasti*, (1889) 42 Ch. D. 685, 690, is not inconsistent with the observations of Lord Selborne in *Ball* v. *Ray*, (1873) L. R. 8 Ch. 467, or with *Bamford* v. *Turnley*, (1860) 3 B. & S. 62. ATTORNEY-GENERAL *v.* COLE & SON
Kekewich J. 205

OMNIBUS BUSINESS—County council—General powers — Statutory powers — Tramway business - - - - 781
See CORPORATION. 2.

PAROL EVIDENCE — Rectification — Marriage settlement—Mistake—Non-execution of a power—Death of donee - - 28
See SETTLEMENT. 4.

PARTICULARS—Trade-mark—Double registration — Non-essential particulars — Disclaimer—Time - - - 382
See TRADE-MARK. 1.

PARTNERSHIP—*Books and Accounts—Right of Partner to Inspection by Agent—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-s.* 9.

Partnership articles provided that proper books of account should be kept by the managing partners for the time being, and such books, together with all bills, letters, and other writings concerning the partnership, should be kept at the counting-house, and each of the partners should have free access to, and liberty to examine and copy, or take extracts from, any of the books and writings of the partnership at all times:—

Held, that neither under the articles, nor under the general law, had any partner the right to introduce a stranger to examine the books and accounts on his behalf. BEVAN *v.* WEBB
Joyce J. 724

2. —— *Mortgage or Assignment of Share—Dissolution—Sale of Share to Co-partner—Rights of Mortgagee or Assignee—Priority—Accounts—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

The mortgagee or assignee of a share in a partnership is not bound by a sale subsequently made of the share by the mortgagor-partner to his co-partners on a dissolution, or by any agreement then made between the partners themselves purporting to alter the amount or value of the share as fixed by the articles. So long as the partnership continues, the mortgagee or assignee is precluded by sub-s. 1 of s. 31 of the Partnership Act, 1890, from interfering in the management or administration of the partnership, or requiring accounts, or inspecting the books, and he must accept the accounts of profits agreed to by the partners; but immediately upon a dissolution he becomes entitled, under sub-s. 2, to have an account taken, as from the date of the dissolution, for the purpose of ascertaining and receiving the actual share of the mortgagor in the partnership assets, quite irrespective of any agreement between the partners for valuing and dealing with such share as between themselves.

One of two partners who were carrying on a business under a partnership deed mortgaged his share with the knowledge of his co-partner, and afterwards, without the mortgagee's consent, agreed to a dissolution on the terms that he should sell his share to his co-partner for a sum which was less than the amount of the mortgage debt:—

Held, by the Court of Appeal, affirming Farwell J., that the agreement was not binding upon the mortgagee, and that he was entitled, under sub-s. 1 of s. 31 of the above Act, to an account, as from the date of the dissolution, for ascertaining the actual share of the mortgagor-partner in the partnership assets, and to payment of the amount of the share when so ascertained. WATTS *v.* DRISCOLL - - - **C. A. 294**

—— Will — Conversion into company — Agreement by executors — Jurisdiction to sanction - - - - 701
See WILL. 8.

PASTURAGE—Prescription—Profit a prendre—Surveyor of highways—Unallotted land
See INCLOSURE. 22

PATENT—*Infringement—Article made Abroad by the Use of Material Manufactured by the Patented*

PATENT—*continued.*

Process—Importation into and Sale in England—Costs—Certificate that Validity of Patent has come in question—"Subsequent Action"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), s. 31.

The defendant imported into and sold in this country an article made abroad. A material made by a process similar to that protected by the plaintiffs' patent was used in the manufacture. The nature of this material was chemically changed by subsequent operations in the course of the manufacture, and the imported article was the material after such chemical change:—

Held, that the defendants were indirectly depriving the patentees of the benefit of their invention, that they had infringed the patent, and that they must be restrained from so doing.

In s. 31 of the Patents, Designs, and Trade Marks Act, 1883, the words "any subsequent action" mean an action commenced after the certificate was granted. SACCHARIN CORPORATION, LIMITED *v.* ANGLO-CONTINENTAL CHEMICAL WORKS **Buckley J. 414**

2. —— *Infringement—Patented Articles bought in England and sent Abroad for Sale—Innocent Purchaser—Transport of Patented Articles—Exposing for Sale—"Using and vending" the Invention—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *Sched. I., Form D—Damages, Measure of.*

A person who has in his possession, for the purpose of sale, an article which is an infringement of a patent thereby renders himself liable for infringement, however innocently he may have acquired the article—as, for instance, by an innocent purchase from an infringing manufacturer—and notwithstanding that he may not have actually exposed it for sale.

Exposing a patented article for sale is a "using and vending" of the invention.

Minter v. *Williams*, (1835) 4 Ad. & E. 251; 1 Web. Pat. Cas. 135, considered.

Whether mere possession of a patented article, without any intention of selling it or using it in trade, by a person other than the patentee in itself constitutes a "user" of the patent, *quære.*

The defendants were innocent purchasers in England, from an infringing manufacturer, of twenty-seven articles protected by letters patent for the United Kingdom only, in the Form D, in Shed. I. to the Patents, Designs, and Trade Marks Act, 1883, conferring upon the patentee the sole privilege to "make, use, exercise and vend" the invention. Eight of these articles they sold in England, and the remaining nineteen they sent to their branch business house in Paris, where they were sold to various foreign purchasers:—

Held, that as, upon the evidence, the defendants had purchased the whole twenty-seven for the purpose of sale, that was a "user" of the invention constituting an infringement in respect of the nineteen sent abroad as well as of the eight sold in England, and that the plaintiffs were entitled to damages (in addition to an injunction, to which the defendants had already submitted) in respect of the whole twenty-seven.

The measure to be applied in assessing damages for infringement of a patent is the

PATENT—*continued.*

pecuniary loss actually sustained by the patentee through the infringement, and no more.

The principle of assessment stated in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, (1899) 16 Rep. Pat. Cas. 209, approved of. *Penn* v. *Jack*, (1867) L. R. 5 Eq. 81, 87, considered.

Whether mere transport from place to place of a patented article is an infringement, *quære. Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*, [1898] A. C. 200, 208, considered. BRITISH MOTOR SYNDICATE, LIMITED *v.* TAYLOR & SONS - - - **C. A. 122**

—— Distress for rent, Seizure and sale under—Right of purchaser to use the same—Injunction - - - - **671**
See DISTRESS.

—— Licence—Burden attaching to property—Right of action - - - **196**
See COMPANY. 1.

PAUPER—Lunatic—Maintenance—Receiver—Debt — Death of lunatic — Rights of creditors - - - - **480**
See LUNACY. 2.

PAYMENT INTO COURT—Charity land—Compulsory sale — Interim investment — Costs - - - - **228**
See LANDS CLAUSES ACTS. 3.

PAYMENT OUT OF COURT—Fund in Court—Payment out to person not entitled—Stop order—Liability to replace fund
See PRACTICE. 3, 4. **460, 464, n.**

PENDING LITIGATION—Conditions of sale—Rescission—Costs—Jurisdiction - **908**
See VENDOR AND PURCHASER. 2.

PERPETUITY—Absolute gift—Gift over on a compound event—Remoteness—Settlement—Intestacy - - - **482**
See WILL. 1.

—— Rules against—Shares—Compulsory transfer at specified price in event of shareholder's bankruptcy - - - **279**
See COMPANY. 12.

—— Uncertainty—Gift to maintain tomb "for the longest period allowed by law" **936**
See WILL. 9.

—— Underlease—Covenant for renewal—Personal covenant—Assignee of reversion
See LANDLORD AND TENANT. 2. **54**

PETITION—Company—Winding-up—Creditor with debt payable at a future date **453**
See COMPANY. 21.

POLLUTION—Rivers—Prescriptive right of drainage—Trade effluent - - **645**
See SEWERS.

POWERS—*Execution—Limited Power—Exercise by Will—"Appoint, Devise, and Bequeath"—Sufficient Reference—No other Power—Evidence.*

A testatrix made the following disposition by her will:—

"I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the

POWERS—*continued.*
same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between" four named nephews and nieces, "or such of them as shall be living at my decease." The four nephews and nieces survived the testatrix.

It appeared that the testatrix had a testamentary power of appointing a share of personal estate among her nephews and nieces, and evidence was tendered to show that she had no other power of appointment:—

Held, that the evidence was admissible, and that the limited power was exercised.

In re Teape's Trusts, (1873) L. R. 16 Eq. 442, and *In re Swinburne*, (1884) 27 Ch. D. 696, followed.

Dictum of Chatterton V.-C. in *In re Richardson's Trusts*, (1886) 17 L. R. Ir. 436, 442, dissented from. *In re* MAYHEW. SPENCER *v.* CUTBUSH - - - - - Farwell J. 677

—— Absolute gift or estate for life with power of appointment—Construction of will
See WILL. 2. 939

—— Ademption—Special testamentary power of appointment — Exercise — Subsequent compulsory sale of property subject to power - - - - 398
See WILL. 4.

—— Domicil—Personal property—Settlement—Will - - - - - 547
See CONFLICT OF LAWS.

—— Estate duty—Incidence—Will exercising power of appointment—Appointed fund—Residue - - - - 691
See REVENUE.

—— Jointuring—"To any woman whom he may marry"—Second Marriage after divorce at instance of first wife - - 165
See SETTLEMENT. 3.

—— Legacy—Gift by appointment under a power—Interest - - - 370
See WILL. 6.

—— Non-execution—Death of donee—Marriage settlement — Rectification — Parol evidence - - - - - 28
See SETTLEMENT. 4.

POWER OF ATTORNEY—Agent—Borrowing—Excess of authority—Money had and received - - - - 261
See PRINCIPAL AND AGENT. 3.

—— Attorney innocently acting under forged power—Liability to third party - 652
See PRINCIPAL AND AGENT. 2.

POWER OF SALE—Mortgage—Chose in action—Shares in company - - 70
See MORTGAGE. 1.

—— Mortgage—Notice by Mortgagor to bank of appointment of a trustee for his creditors — Banker and customer — Closing account - - - 188
See BANKER.

PRACTICE — *Appeal — Interlocutory Order — Leave to Appeal—Liberty of Subject—Refusal to Commit—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (*b*), (i.).

A judge having refused an application for the committal of the defendants on the ground of a breach by them of an undertaking which they had given to the Court, and having refused to give leave to appeal:—

Held, that the liberty of the subject was not concerned, and that an appeal could not be brought without leave, which the Court of Appeal refused to give. BOWDEN *v.* YOXALL C. A. 1

2. —— *Deceit—Action of—Get-up—Passing off—Evidence—Probability of Deception—Inspection—View by Judge—Rules of Supreme Court*, 1883, *Order* L., *r.* 4.

In an action for deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the judge, on a view by him of the two articles—such as two rival omnibuses—under the rules of the Supreme Court, 1883, Order L., r. 4, that the defendant's article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.

North Cheshire and Manchester Brewery Co. v. *Manchester Brewery Co.*, [1899] A. C. 83, considered. LONDON GENERAL OMNIBUS COMPANY, LIMITED *v.* LAVELL - - - C. A. 135

3. —— *Fund in Court — Payment out to Person not entitled—Non-disclosure of Facts by Applicant and his Solicitor — Absence of Stop Order—Commissioners of Treasury—Liability to replace Fund—Default of Paymaster—Court of Chancery Funds Act*, 1872 (35 & 36 *Vict. c.* 44), *s.* 5.

If a person becoming interested in a fund in court standing to an account in the name of another does not obtain any stop order against the fund, and the fund is subsequently paid out in disregard of his interest to a person apparently, but not in fact, entitled to it, the Paymaster-General is not guilty of default within the meaning of s. 5 of the Court of Chancery (Funds) Act, 1872, so as to make the Treasury liable to make good the fund out of the Consolidated Fund.

So *held*, on the authority of the decision of Earl Cairns L.C., in the unreported case of *Jones* v. *Jones*, [1901] 1 Ch. 464, n. BATH *v.* BATH - - - - Kekewich J. 460

4. —— *Fund in Court — Payment out to Person not entitled — Absence of Stop Order — Treasury Commissioners — Liability to replace Fund—Default of Paymaster.*

Petition in the action and in the matter of the Court of Chancery (Funds) Act, 1872, asking for the certificate of the Lord Chancellor to the Treasury Commissioners that the Paymaster-General had been guilty of default in allowing a share of certain funds in court to the credit of a particular account in the action to be sold and transferred without notice to the petitioner Fielding, in disregard of the directions contained in a certain order in the action, and that such sum as represented the share in question, and the costs of the petitioners, ought to be paid out of the

PRACTICE—*continued.*
Consolidated Fund to the credit of the Paymaster-General to the petitioner Gibbons.
The Lord Chancellor declined to make an order upon the petition. JONES *v.* JONES.
Earl Cairns L.C. 464, n.

5. —— *Motion by Defendant before Pleading —Mandatory Interlocutory Injunction against Plaintiff—Order to Deliver up Possession of a House.*
Per Buckley J.: A defendant may before delivering a counterclaim apply by motion for an injunction against the plaintiff if he and the plaintiff are both suing upon the same contract.
An interlocutory injunction was, on the defendant's motion, granted to restrain the plaintiff from interfering with or disturbing the defendant in his possession and occupation of a house.
Spurgin v. *White*, (1860) 2 Giff. 473, followed.
Decision affirmed by the Court of Appeal. COLLISON *v.* WARREN - - **C. A. 812**

6. —— *Undertaking—Procedure—Solicitor—Writ of Summons — Service, Acceptance of — Entering Appearance—Undertaking—Proceeding with Action — Delay — Writ enforceable after Twelve Months—Attachment—Application, Form of—Rules of the Supreme Court*, 1883, *Order* VIII., *r.* 1; *Order* IX., *r.* 1; *Order* XII., *r.* 18.
Where, with the authority of the defendant in an action, his solicitor accepts service of the writ on his behalf and gives a written undertaking, under Rules of the Supreme Court, 1883, Order IX., r. 1, to "enter an appearance in due course," that undertaking is unconditional and must be performed forthwith, and, at the instance of the plaintiff, it can be enforced by attachment of the solicitor under Order XII., r. 18.
The solicitors to the defendant in an action accepted, by his authority, service of the writ on his behalf, and at the same time gave the plaintiff's solicitor a written undertaking to enter an appearance in due course, but, on account of a proposal by the defendant for settlement, the time for appearance was extended for two months. No appearance was ever entered, and no step was taken in the action for a further period of eighteen months, when the plaintiff, desiring to proceed, required the defendant's solicitors to enter appearance pursuant to their undertaking, which they declined to do, on the ground that their clients, considering the action at an end, had directed them not to enter appearance.
Upon an application by the plaintiff, under Order XII., r. 18, to attach the solicitors for breach of their undertaking, the Court of Appeal, affirming Farwell J., ordered the solicitors to enter appearance forthwith, with liberty to the plaintiff to renew his application in case of their default.
An original writ of summons, notwithstanding the expiration of the twelve months limited by Order VIII., r. 1, and even though not renewed under that rule, still continues effectual for all purposes except that of service, the limit of time applying to service only.
An application by a plaintiff under Order XII., r. 18, to enforce by attachment a written undertaking by the defendant's solicitor to enter an appearance to the writ, should be made and intituled, not in the action, but in the matter of the solicitor, by virtue of the jurisdiction of the Court over its officers.
Per Farwell J.: A written undertaking by a solicitor acting on the authority of a defendant, to enter an appearance to the writ, constitutes a contract on the part of the defendant by the solicitor or his agent to enter appearance, and differs from an ordinary contract only in that it may be enforced against the solicitor himself by attachment at any time within six years, provided the action continues effective. *In re* KERLY, SON AND VERDEN - - **C. A. 467**

—— Attachment—Writ of—Trustee ordered to pay into court money in possession or under control — Actual receipt — Evidence - - - - **447**
See ATTACHMENT.

—— Compromise—Power of Court to bind absent persons—Extent of jurisdiction - **769**
See COMPROMISE.

—— Costs—Higher scale—Special grounds **561**
See COSTS.

—— Costs—Lands Clauses Acts—Interim investment—Brokerage and other charges **923**
See LANDS CLAUSES ACTS. 4.

—— Costs—Solicitor.
See Cases under SOLICITOR.

—— Demurrer, Proceeding in lieu of—Right to begin - - - - **894**
See MARKET.

PREFERENCE — Fraudulent — Bankruptcy — Surety—"Creditor" - - **77**
See COMPANY. 15.

—— Fraudulent—Company—Winding-up **250**
See COMPANY. 19.

PRESCRIPTION—Ancient demesne—Custom — Fine on alienation—Foreigner — Evidence - - - - **842**
See MANOR.

—— Profit a prendre—Pasturage—Surveyor of highways—Unallotted land - **22**
See INCLOSURE.

—— Sewers — Prescriptive right of drainage—Trade effluent - - - **645**
See SEWERS.

PRESUMPTION—Child-bearing, Woman past—Impossibility of issue—Widow who has had a child - - - - **570**
See EVIDENCE.

—— Mistake—Number of Legatees—Illegitimate children—Evidence of intention - **404**
See WILL. 7.

—— Roadside waste—Dedication—Evidence **873**
See HIGHWAY.

PRINCIPAL AND AGENT—*Contract by Agent on behalf of Principal—Want of Authority—Liability of Agent—Knowledge of Want of Authority by other Contracting Party.*
A person who purports to contract as agent on behalf of an alleged principal is liable on an implied warranty of his authority only if the other

PRINCIPAL AND AGENT—*continued.*
contracting party relied on the existence of authority in fact. He is not so liable if, at the time of purporting to contract, he expressly disclaimed any present authority.

Collen v. *Wright*, (1857) 7 E. & B. 301; 8 E. & B. 647, followed.

The observations of Mellish L.J. in *Beattie* v. *Lord Ebury*, (1872) L. R. 7 Ch. 777, 800, applied.

The proposition in *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, 11, that there must be some wrong or omission on the part of the agent in order to make him personally liable in respect of a contract made in the name of his principal, is negatived by *Collen* v. *Wright*. HALBOT *v.* LENS
Kekewich J. 344

2. —— *Implied Warranty of Authority — Attorney innocently acting under Forged Power—Liability to Third Party—Transfer of Stock under Forged Power.*

A firm of stockbrokers, on the instructions of a solicitor, applied to the Bank of England for forms of powers of attorney to S. and L., two of the firm, to sell Consols and bank stock standing in the names of the solicitor and the plaintiff. The forms were issued, and sent by the brokers to the solicitor, and returned by him to them. They were executed by the solicitor, and purported to be executed by the plaintiff, and to be duly attested, and the two stockholders thereby purported to appoint S. and L. jointly and severally, their attorneys and attorney, to sell and transfer the two sums of stock. The powers were taken to the bank by S. The transfer tickets were signed by S. and L, and were passed by the bank, but S. alone signed the demand to act by the powers. He was allowed to execute the transfers in the bank books of the Consols and bank stock as attorney for the two stockholders. The proceeds of the sale were paid to the solicitor. The plaintiff's signature to the powers was forged, and in an action by him the transfers were declared void as against him, and the bank were ordered to replace the two sums of stock, and to pay him the back dividends. The bank claimed indemnity against the firm of brokers and against S. and L. No blame was attributable either to the firm, or S., or the bank for what had happened:—

Held, that the transfers by S. in each case implied a warranty by him that he was authorized to transfer in the names of the stockholders, and that on that warranty, though he honestly believed he had authority, he was liable to the bank; but that the partners were not liable, no damage having accrued to the bank from the application for the powers, nor from the powers themselves, until acted upon.

Collen v. *Wright*, (1857) 8 E. & B. 647, 657, and *Firbank's Executors* v. *Humphreys*, (1886) 18 Q. B. D. 54, 60, 62, followed and applied.

Polhill v. *Walter*, (1832) 3 B. & Ad. 114; 37 R. R. 344, and *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, distinguished. OLIVER *v.* GOVERNOR AND COMPANY OF BANK OF ENGLAND. STARKEY, LEVESON AND COOKE, THIRD PARTIES
Kekewich J. 652

3. —— *Power of Attorney — Construction — General Words—Ejusdem generis — Borrowing—Excess of Authority—Money had and received.*

The plaintiff, who traded in Australia under a firm name, gave to his London agent a power of attorney to buy goods for him in connection with the business, either for cash or on credit, with power to modify or cancel the contracts for purchase, and "where necessary, in connection with any purchases made on my behalf as aforesaid or in connection with my said business," to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper in the premises, and to sign the plaintiff's name or his trading name to any cheques on his banking account in London. The attorney, purporting to act on behalf of the plaintiff under this power, obtained a loan of 4000*l.* from M. & Co. ostensibly for the general purposes of the business, and accepted bills of exchange to that amount in his own name per pro the firm. The 4000*l.* was paid into the plaintiff's London banking account, and drawn out by the attorney, who misapplied it, without the knowledge of the plaintiff:—

Held, (1.) upon the construction of the power, that the general words, when construed with the preceding context, did not confer a general power of borrowing; (2.) that the 4000*l.* could not be claimed as money had and received by the plaintiff for the use of M. & Co., inasmuch as he did no know, and had no means of knowing, that the money had been paid into his account until after it was drawn out.

Marsh v. *Keating*, (1834) 1 Bing. N. C. 198; 37 R. R. 75, discussed and applied. JACOBS *v.* MORRIS - - - - **Farwell J. 261**

—— Dramatic Copyright — Infringement — "Printed or cause to be printed" **374**
See COPYRIGHT.

—— Partnership—Books and accounts—Right of partner to inspection by agent - **724**
See PARTNERSHIP. 1.

PRIORITY—Mortgagee or assignee of share, Rights of—Dissolution—Sale of share to co-partner—Accounts - - **294**
See PARTNERSHIP. 2.

—— Mortgages—Notice - - - **865**
See MORTGAGE. 2.

—— Mortgagor and subsequent transferee—Fraud of mortgagor's solicitor - **213**
See MORTGAGE. 3.

—— Voluntary debt—Creditors—Insolvent estate—Bankruptcy rule - - **9**
See ADMINISTRATION. 2.

PRIVITY OF CONTRACT—Patent—Licence—Burden attaching to property—Right of action - - - - **196**
See COMPANY. 1.

PROFITS—Director—Fiduciary relation—Conflict of interest with duty—Contracts with company—Account - - **746**
See COMPANY. 2.

—— Promoter—Secret profit—Duty as to extent of disclosure - - - **582**
See COMPANY. 11.

PROFIT A PENDRE—Prescription—Pasturage—Surveyor of highways—Unallotted land - - - - - 22
See INCLOSURE.

PROHIBITION—Contract—Validity—Corporation shareholders—City of London—Electric lighting - - - 602
See CORPORATION. 1.

PROMOTERS—Lands Clauses Act—Notice to treat - - - - - 591
See LANDS CLAUSES ACTS. 2.

—— Secret profit—Duty as to extent of disclosure - - - - 582
See COMPANY. 11.

PUBLIC—Secret trust—Trust for benefit of public, but so that they should acquire no rights - - - - 352
See CHARITY.

PUBLIC HEALTH—Sewers—Prescriptive right of drainage—Trade effluent - 645
See SEWERS.

—— Street, Expenses of making—Charge on premises—Payment by owner - 689
See SETTLED LAND. 2.

PUBLIC-HOUSE.
See INN.

PUBLIC POLICY—Jointuring—Power of—Construction—Validity - - 165
See SETTLEMENT. 3.

PURCHASE-MONEY—Lands Clauses Acts—Investment.
See Cases under LANDS CLAUSES ACTS.

PURCHASER—Vendor and.
See Cases under VENDOR AND PURCHASER.

QUORUM—Directors—Breach of regulations by—Validity of Act as regards third parties - - - - 115
See COMPANY. 3.

RAILWAY—*Superfluous Land—Tunnel—Surface of Land over Tunnel—Space above usque ad Cœlum—Telegraph Wires—Statute of Limitations.*

A disseisor can acquire against a railway company under the Statute of Limitations a title to the surface of land vertically over a tunnel used by the company, and he thereby acquires a title, not to the surface only, but also usque ad cœlum.

In re Metropolitan District Ry. Co. and Cosh, (1880) 13 Ch. D. 607; *Norton* v. *London and North Western Ry. Co.*, (1879) 13 Ch. D. 268; and *Bobbett* v. *South Eastern Ry. Co.*, (1882) 9 Q. B. D. 424, discussed and considered. MIDLAND RAILWAY COMPANY *v.* WRIGHT - - Byrne J. 738

—— Lands Clauses Act—Notice to treat - 591
See LANDS CLAUSES ACTS. 2.

REAL PROPERTY LIMITATION—"Concealed fraud"—Innocent possession - 143
See LIMITATIONS, STATUTE OF.

RECEIVER—Lunatic—Pauper—Maintenance—Debt—Death of lunatic—Creditors, Rights of - - - - 480
See LUNACY. 2.

RECTIFICATION—Marriage settlement—Mistake—Parol evidence—Non-execution of a power—Death of donee - - 28
See SETTLEMENT. 4.

REGISTRATION—Trade-mark—Double registration—Non-essential particulars—Disclaimer—Time - - - 382
See TRADE-MARK. 1.

REMAINDERMAN—Tenant for life and—Tapestries—Right of removal - - 523
See FIXTURES.

—— Unauthorized investment—Loss—Apportionment - - - - 916
See TENANT FOR LIFE AND REMAINDERMAN.

REMOTENESS—Absolute gift—Gift over on a compound event—Perpetuity—Settlement—Intestacy - - - 482
See WILL. 1.

REMOVAL—Application to remove liquidator—Circularising shareholders—Contempt of Court - - - - 860
See COMPANY. 20.

REMUNERATION—Director—Vacating office by absence for specified period—Time 728
See COMPANY. 4.

RENEWAL—Covenant for—Underlease—Personal covenant—Perpetuity—Assignee of reversion - - - - 54
See LANDLORD AND TENANT. 2.

RENT—Distress—Patented chattel—Sale—Right of purchaser to use the same—Injunction
See DISTRESS. 671

RENT-CHARGE—*Charge on Fee Simple—Application to raise Arrears by Sale—Effect of creating Term.*

Where a rent-charge is charged on the fee simple, but a term of years is vested in trustees upon trust that when the rent-charge is in arrear the trustees shall out of the rents and profits, or by mortgaging or demising the term, raise and pay the rent-charge, the owner of the rent-charge must resort to the term, and is not entitled to an order for sale of the fee simple to raise arrears of the rent-charge.

Hall v. *Hurt*, (1861) 2 J. & H. 76, followed. BLACKBURNE *v.* HOPE-EDWARDES **Buckley J.** 419

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RETAINER—*Right of—Insolvent Estate—Legal Personal Representative and Devisee—Tenant for Life—Cestui que Trust of the Debt—Claim of Trustees of Settlement.*

A testator, by the settlement made on his marriage with the defendant, his wife, covenanted with the trustees for the payment of a sum of 5000*l.* six months after his death, to be held upon trust for the defendant for life, and for the children of the marriage, and in default of children for the testator absolutely: the testator's residuary real and personal estate was devised and bequeathed to the defendant absolutely, and letters of administration with the will annexed had been granted to her: there were no children, and the estate was insolvent. The defendant, as the widow and personal representative and devisee of the real estate, claimed the right to retain this 5000*l.* out of the testator's real and personal estate on behalf of herself and the trustees of the settlement in priority to all other creditors:—

Held, that the trustees of the settlement being the persons to sue for and recover this 5000*l.* debt, and not the legal personal representative, she had no right of retainer.

Loomes v. *Stotherd*, (1823) 1 S. & S. 458; 1 L. J. (O.S.) (Ch.) 220: 24 R. R. 209, examined, and held to have been overruled on this point by *In re Dunning*, (1885) 54 L. J. (Ch.) 900. *In re* HAYWARD. TWEEDIE *v.* HAYWARD **Byrne J. 221**

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REVENUE—*Estate Duty—Incidence—Will exercising Power of Appointment—Appointed Fund—Residue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Where a general power of appointment over a fund is exercised by will, the appointed fund passes to the executor as such, and, consequently, the estate duty in respect thereof is payable out of residue.

In re Treasure, [1900] 2 Ch. 648, not followed on this point. *In re* MOORE. MOORE *v.* MOORE **Buckley J. 691**

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SERVICE—Acceptance of — Solicitor — Undertaking—Proceeding with action—Delay—Attachment - - - 467
See PRACTICE. 6.

SETTLED ESTATES—*Infant Tenant in Tail—Maintenance—Direction to accumulate Surplus*

SETTLED ESTATES—*continued.*

Income — Allowance for Up-keep of Family Mansion— Subscriptions to Local Charities.

A testator devised real estates upon trusts under which, in the events which happened, A. became infant tenant in tail in possession. The will directed that during the minority of any person for the time being tenant in tail in possession the trustees should apply 500*l.* per annum out of the income for the maintenance and education of the minor, and should accumulate the surplus income for the benefit of the minor on attaining twenty-one. The testator also bequeathed nearly half a million in money to be invested in real estate to be held upon the same trusts as the devised estates. The net income of the settled property exceeded 14,000*l.* per annum.

The Court sanctioned a scheme for allowing 4,000*l.* per annum out of the income for the up-keep of the family mansion and the maintenance there of the infant tenant in tail in a manner befitting the social position he would occupy in life. This allowance included 100*l.* per annum for subscriptions to local charities. *In re* WALKER, WALKER *v.* DUNCOMBE - - **Farwell J. 879.**

SETTLED LAND — *Capital Money — Improvement—New Floor—Alterations with a view to Letting — Property already Let — Intention to Let—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21 *sub-s. iii.*, 25, 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13 *sub-s. ii.*, 15.

By s. 13, sub-s. ii., of the Settled Land Act, 1890, capital money may be applied in "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let":—

Held, that the substitution for ordinary floor boards resting on joists of a block floor over concrete in order to keep dry rot out of the basement of a large house let in separate offices was an "alteration" within the sub-section.

That "reasonably necessary and proper" meant something which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do to make his house habitable; and that the new floor was reasonably necessary and proper within the sub-section.

That the jurisdiction under the sub-section to order the application of capital money in payment for an alteration depended not upon whether there was to be an immediate letting, but upon whether there was a present intention to let the premises as distinguished from an intention to occupy them; and that the new floor ought to be paid for out of capital, although substantially the whole of the house was already let. STANFORD *v.* ROBERTS **Buckley J. 440**

2. —— *Incumbrance — Discharge — Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11—*Expenses of making Street—Charge on Premises—Payment by Owner—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.

The tenant for life of an estate paid expenses which had been incurred by a local authority and made a charge upon the estate by s. 257 of the Public Health Act, 1875:—

Held, that this was a charge on the inheritance, and that he was entitled to keep it alive as an incumbrance on the settled land, and to raise money under s. 11 of the Settled Land Act, 1890, by mortgage of the estate for the purpose of discharging it. *In re* J. SMITH'S SETTLED ESTATES - - **Buckley J. 689**

3 —— *Leasing, Power of—Bonâ fide Exercise—Settled Estate—Tenant for Life—Person having Powers of—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

The defendant was entitled under the will of her deceased husband to the use and enjoyment rent free of a certain house for so long during her widowhood as she should personally reside in the same. Being minded to marry again, she proposed to exercise her leasing powers as tenant for life under the Settled Land Acts by granting a lease of the house to her intended husband for twenty-one years. The plaintiffs, who were entitled in remainder on the cesser of her interest, objected to the lease and brought an action to restrain her from granting it. On motion for an injunction:—

Held, that, having regard to the defendant's object in granting the lease, it was not a bonâ fide exercise of the powers of a tenant for life under the Settled Land Acts, and the plaintiffs were entitled to succeed. MIDDLEMAS *v.* STEVENS **Joyce J. 574**

4. —— *Leasing Powers—Charges of Estate Agent for procuring Lease — Application of Capital Money—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* 10.

The commission charged by an estate agent for procuring a lease of settled land for a tenant for life under the Settled Land Act, 1882, is payable out of capital money arising under the Act. *In re* MARYON WILSON'S SETTLED ESTATES **Joyce J. 934**

—— Bona vacantia—Escheat—Death of testator without heirs; - - - **15**
See CROWN.

SETTLEMENT—*Assignment of Future Property—Gift from Husband—Marriage Settlement—Construction.*

An assignment by the intended wife in a marriage settlement of her property and fortune, both present and expectant or future, *held* not to comprise a sum of money which the husband made a present of to the wife long afterwards. COLES *v.* COLES - - - - **Joyce J. 711**

2. —— *Covenant to settle after-acquired Property—500l. or upwards—Legacies—Deduction of Duty—Time and Source of Payment—Husband and Wife.*

A legacy of 500*l.*, which by payment of duty at 10 per cent. has been reduced to 450*l.*, is not within a covenant to settle any after-acquired property of the value of 500*l.* or upwards.

A legacy out of general estate given by a codicil to a will, and a legacy given by another codicil to the same will out of the proceeds of sale of real estate which has not yet been sold, are acquired at one and the same time, namely, the death of the testatrix, and from one and the same source, namely the testatrix. They must therefore be added together and treated as one sum for

SETTLEMENT—*continued.*

the purpose of a covenant to settle any property to which a married woman should become entitled "at one and the same time and from one and the same source." *In re* PARES. *In re* SCOTT CHAD. SCOTT CHAD *v.* PARES - **Buckley J. 708**

3. —— *Jointuring—Power of—Construction—Validity—Public Policy—Power to appoint Jointure "to any Woman whom he may Marry"—Second Marriage after Divorce at instance of First Wife.*

By a deed of resettlement of family estates power was given to the second tenant for life "to appoint to any woman whom he may marry" for her life a jointure rent-charge not exceeding the yearly sum of 2500*l.*, to be charged on the estates. And it was declared that the power might be exercised as often as the donee should marry. There was a proviso that the charge on the estates by way of jointure should not at any one time exceed in the whole the annual sum of 4000*l.*

In 1869 the donee married, and by a settlement made on his marriage he, in exercise of the power, appointed to his wife during her life, in case she should survive him, a jointure rent-charge of 2500*l.*

In 1883 the marriage was dissolved on the wife's petition. In 1888 the donee married again, and by a post-nuptial settlement he, in exercise of the power, appointed to his second wife, during her life, in case she should survive him, a jointure rent-charge of 2500*l.*

In 1892 the donee died. Both the wives survived him:—

Held, that the appointment of a jointure to the second wife was authorized by the power, though she could not receive more than 1500*l.* a year during the life of the first wife:

Held also, that, though the power operated to make provision for the event of a divorce of the donee from his first wife, it was not thereby rendered illegal or contrary to public policy.

Cartwright v. *Cartwright*, (1853) 3 D. M. & G. 982; *H.* v. *W.*, (1857) 3 K. & J. 382; and *Cocksedge* v. *Cocksedge*, (1844) 14 Sim. 244, distinguished.

Decision of Byrne J. affirmed. LILY, DUCHESS OF MARLBOROUGH *v.* DUKE OF MARLBOROUGH - - - - **C. A. 165**

4. —— *Rectification — Mistake — Parol Evidence—Non-execution of a Power—Death of Donee —Marriage Settlement—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

In an action to rectify a settlement after the death of the husband, on the ground that it did not exercise a certain power of appointment in favour of the wife, in accordance with the arrangement alleged to have been entered into prior to the marriage, the defendants pleaded the 4th section of the Statute of Frauds; they also contended that relief could not be given against a non-execution, as distinct from an imperfect execution, of a power, and particularly after the death of the donee thereof:—

Held, that parol evidence was admissible in an action to rectify a mistake in a settlement, notwithstanding the Statute of Frauds, an action of that kind not being one seeking "to charge

SETTLEMENT—*continued.*

any person upon any agreement made upon consideration of marriage" within the meaning of s. 4; that relief could be given, and that rectification in the present case did not amount to aiding the non-execution or defective execution of a power; when once the settlement was made to accord with what the Court found to have been the real bargain and intention of the parties to it, no further deed or defective relief was necessary. JOHNSON *v.* BRAGGE **Cozens-Hardy J. 28**

5. —— *Ultimate Trust in Default of Children of the Marriage "for all and every the Child and Children or Grandchild" of A. living at the Death of the Survivor of the Husband and Wife—Children and Grandchildren of A. living at the Period of Distribution—Marriage Settlement.*

A trust in a marriage settlement of certain stocks and securities for the benefit of the husband and wife and the children of the marriage, and in default of children (which event happened) then, upon the death of the survivor of the husband and wife, "for all and every the child and children or grandchild of A." living at the death of the survivor of the husband and wife.

The husband survived the wife, and died in January 1900. A. had thirteen children, of whom eight survived the husband and five died in his lifetime, four unmarried, and one leaving an only child:—

Held, that "or" was not to be read "and," and, there being children of A. living at the period of distribution, no grandchild took a share. *In re* COLEY. GIBSON *v.* GIBSON **Byrne J. 40**

—— Domicil — Personal property — Power of appointment—Will - - **547**
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—— Will—Absolute gift—Gift over on a compound event—Remoteness—Intestacy
See WILL. 1. **482**

SEWERS—*Prescriptive Right of Drainage—Trade Effluent—Local Authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 21—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

In the year 1885 a local authority connected with one of their sewers a drain which carried the effluent from the plaintiffs' manufactory, and this connection remained, and by means of it the effluent continued to flow into the sewer, until in 1899 the local authority threatened to cut off the connection:—

Held, that under s. 21 of the Public Health Act, 1875, the plaintiffs had an absolute right to discharge their effluent into the sewer, and that if that right had been qualified by s. 7 of the Rivers Pollution Prevention Act, 1876, the facilities given by the local authority to the plaintiffs for carrying their effluent into the sewer ought not to be withdrawn, unless either of the provisos to s. 7 applied, namely, unless it could be shown that the effluent would prejudicially affect the sewers or the disposal of the sewage matter conveyed along them, or would be injurious in a sanitary point of view, or that the

SEWERS—*continued.*
sewers of the local authority were only sufficient for the requirements of their district:

Held, therefore, that, none of these things having been shown, the local authority must be restrained from cutting off the connection between the plaintiffs' drain and the sewer.

Decision of Byrne J., [1900] 1 Ch. 781, affirmed. EASTWOOD BROTHERS, LIMITED *v.* HONLEY URBAN COUNCIL - - **C. A. 645**

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—— Mortgage—Chose in action—Power of sale *See* MORTGAGE. 1. **70**

SHELLEY'S CASE—Rule in—Real estate—Will—Construction - - - **720**
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SHIFTING CLAUSE—Successive life estates—Exception of eldest son entitled to other estates - - - - **819**
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SHORTHAND NOTES—Costs - - **523**
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SOLICITOR—*Costs—Lien—Infants—Compromise—Judgment—Reserving Liberty to Solicitor to Apply—Form of Order.*

A solicitor acting for infants in an action, in consenting to a judgment-compromise whereby a specific fund brought into court in the action is ordered to be paid out to trustees for the benefit of the infants, is entitled to the ordinary solicitor's lien for his costs upon the interests of the infants in the fund as fully and effectually as he would have been entitled thereto had his clients been persons sui juris; and it is not necessary, though it may be desirable, that his right under such lien should be expressly reserved by the judgment. *In re* WRIGHT'S TRUST. WRIGHT *v.* SANDERSON. *In re* SANDERSON'S TRUST. WRIGHT *v.* SANDERSON - - - - **C. A. 317**

2. —— *Costs—Rectification of post-nuptial Settlement, Action for.*

Liberty to apply, in case of non-recovery of party and party costs, for them to be paid out of the trust fund. Form of order. RAKE *v.* HOOPER **Kekewich J. 325, n.**

3. —— *Costs—Taxation—Lessor and Lessee—Costs of Lease—Preliminary Negotiations—Third Party—Solicitor and Client—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Lessees having obtained the usual third party order to tax the lessor's solicitor's bill of costs in the preparation of a mining lease, took objection to the allowance by the taxing master of certain items for charges for negotiations leading up to the lease, and in particular for fees paid to a mining engineer who had been consulted on behalf of the lessor, and for various correspondence with him. On a summons to review this taxation:—

Held, that the third party order to tax obtained by the lessees did not alter the nature or enlarge the scope of their liability, upon the existence of which the order to tax was based; but that even

SOLICITOR—*continued.*
on a third party taxation the Court was bound to look at the nature of the items, and to consider whether, apart from the order, the applicant was under any liability to pay them; and that the bill must therefore be referred back to the taxing master to revise his taxation.

Though a solicitor may include in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax thereby render himself liable for the whole bill.

In re Negus, [1895] 1 Ch. 73, considered and applied. *In re* GRAY - **Cozens-Hardy J. 239**

4. —— *Costs—Taxation at Instance of Cestui que Trust—Bill paid by Trustees more than Twelve Months previously—Practice—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37–41.

By virtue of the proviso in s. 41 of the Solicitors Act, 1843, taxation, upon the application of a cestui que trust of a bill of costs paid by his trustees, will not be ordered under s. 39 where the application is not made within twelve calendar months after payment; regard being had to what must now be treated as the settled practice of the Court.

Decision of Kekewich J., [1900] 1 Ch. 857, reversed. *In re* WELLBORNE - - **C. A. 312**

—— Undertaking—Proceeding with action—Delay—Attachment - - **467**
See PRACTICE. 6.

SPECIFIC DEVISE—Residuary devise - **619**
See WILL. 10.

SPECIFIC PERFORMANCE—*Written Offer containing Two Alternatives—Verbal Acceptance of One—Agreement to Let from Year to Year—Statute of Frauds, s.* 4.

Verbal acceptance of one of two alternatives contained in a written and signed offer is sufficient to constitute an enforceable contract as against the writer.

Dictum of Earl Cairns L.C. in *Hussey* v. *Horne-Payne*, (1879) 4 App. Cas. 311, 317, discussed and followed.

Specific performance of an agreement to let from year to year will be enforced.

Clayton v. *Illingworth*, (1853) 10 Hare, 451, and *De Brassac* v. *Martyn*, (1863), 11 W. R. 1020, considered. LEVER *v.* KOFFLER **Byrne J. 543**

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39 & 40 Vict. c. 75, s. 7—*Rivers Pollution Prevention* - - - - 645
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41 & 42 Vict. c. 54—*Debtors* - - 447
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44 & 45 Vict. c. 41, s. 2 (xv.); s. 14, sub-ss. 1, 2, 3, 6—*Conveyancing and Law of Property* - - - - 499
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TENANT FOR LIFE—Residue — Direction to accumulate income beyond twenty-one years - - - - 64
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TENANT FOR LIFE AND REMAINDERMAN—*Apportionment—Unauthorized Investment—Loss.*

Where a trustee, without the knowledge of the tenant for life or remainderman, sells out an authorized investment and places the proceeds on

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an unauthorized investment which results in a partial loss of income and capital, the tenant for life is entitled to such a proportion of the amount realized by the unauthorized investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorized investment in the same period bear to the capital value of the authorized investment plus those dividends, the tenant for life being liable to bring into account all income he received from the unauthorized investment, although not liable to refund. *In re* BIRD. *In re* EVANS. DODD *v.* EVANS
Farwell J. 916

—— Infant—Maintenance—Allowance for upkeep of family mansion—Subscriptions to local charities - - - 879
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TRADE—Sewers—Prescriptive right of drainage—Trade effluent - - - 645
See SEWERS.

TRADE-MARK — *Double Registration — Non-essential Particulars — Disclaimer — Time — Patents, Designs, and Trade Marks Acts*, 1883–1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *s.* 62.

Registration will not be allowed of a trade-mark identical in essential particulars with, but differing in non-essential particulars from, a registered mark of the applicant himself.

The exclusive use of non-essential particulars on a trade-mark must be disclaimed in the application for registration. Subsequent amendment will not be allowed. *In re* PLAYER & SONS' TRADE-MARK, No. 225,035 Cozens-Hardy J. 382

2 —— *Invented Word—Non-descriptive Word*

TRADE-MARK—*continued.*
—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *as amended by Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Uneeda" being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of s. 64, sub-s. 1 (*d*), of the Trade Marks Act. Moreover, it is descriptive of the quality or character of goods; and on both these grounds it is not the proper subject of registration as a trade-mark. *In re* "UNEEDA" TRADE-MARK
Cozens-Hardy J. 550

TRAMWAY—County council—General powers—Statutory powers—Tramway business
See CORPORATION. 2. 781

TRANSFER — Shares—Compulsory transfer at specified price in event of shareholder's bankruptcy—Fraud on bankruptcy law
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—— Stock—Attorney innocently acting under forged power—Liability to third party
See PRINCIPAL AND AGENT. 2. 652

TRUST—Secret trust—Trust for benefit of public, but so that they should acquire no rights - - - - 352
See CHARITY. 2.

TRUSTEE — *Appointment — Absence Abroad — Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-s.* 1.

One of two trustees purported to appoint a new trustee in the place of his co-trustee under the power in that behalf conferred by sub-s. 1 of s. 10 of the Trustee Act, 1893, on the ground that the co-trustee had resided abroad for more than twelve months. The co-trustee had remained out of the United Kingdom for more than twelve months, except for one week when he was in London:—

Held, that the event upon which the power arose had not happened and that the appointment was bad. *In re* WALKER. SUMMERS *v.* BARROW - - - - Farwell J. 259

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TUNNEL—Superfluous land—Space above usque ad cœlum—Telegraph wires—Statute of Limitations - - - - 738
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UNDERTAKING — Solicitor — Proceeding with action—Delay—Attachment - 467
See PRACTICE. 6.

VACATING OFFICE—Director—Absence—Time—Remuneration - - - 728
See COMPANY. 4.

VENDOR AND PURCHASER—*Conditions of Sale — Misleading Particulars — Statement by Auctioneer—Compensation—Specific Performance.*

A clear and distinct statement by an auctioneer at the time of sale verbally correcting a material misdescription in the particulars disentitles the purchaser to specific performance with compensation for that misdescription, even if he does not hear the statement.

Manser v. *Back*, (1848) 6 Hare, 443, followed. *In re* HARE AND O'MORE'S CONTRACT **Joyce J. 93**

2. —— *Conditions of Sale—Rescission—Pending Litigation—Costs—Jurisdiction.*

A condition of sale providing that if the purchaser should insist on any requisition which the vendors should be unwilling to comply with, and should not withdraw the same after being required so to do, the vendors should (notwithstanding "any intermediate or pending negotiation, proceeding, or litigation") be at liberty to rescind the contract, and should thereupon return to the purchaser his deposit, "but without any interest, costs of investigating the title, or other compensation or payment whatsoever," does not oust the jurisdiction of the Court to order the vendors to pay the costs of a litigation pending at the date of rescission.

Duddell v. *Simpson*, (1866) L. R. 2 Ch. 102, 108, followed. *In re* SPINDLER AND MEAR'S CONTRACT - - - - **Farwell J. 908**

3. —— *Deposit — Contract to buy Plot on a Building Estate—Vendor to erect specified number of Houses — Option to Purchaser to rescind if Houses not built—Alienation of Building Estate with Notice of Contract —Rescission of Contract by Purchaser—Lien for Deposit.*

A. contracted with B. to purchase a plot of land on a building estate, the purchase to be completed when 300 houses had been built on the estate; and, if the houses were not built by a certain date, A. had an option to cancel the contract. B. mortgaged the estate to C., who sold under his power of sale to D. with notice of the contract. The houses were not built, and subsequently A. gave D. notice cancelling the contract:—

Held, that A., as against D., had a lien on the property for the deposit he had paid B. on signing the contract.

Rose v. *Watson*, (1864) 10 H. L. C. 672, followed.

VENDOR AND PURCHASER—*continued.*

Dictum of Kay L.J. in *Rodger* v. *Harrison*, [1893] 1 Q. B. 173-4, dissented from. WHITBREAD & Co. *v.* WATT - - **Farwell J. 911**

4. —— *Title — Adverse Rights — Notice by Tenancy.*

A tenant's occupation of land affects a purchaser with notice of all that tenant's rights, but not of his lessor's title or rights.

Actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights; but the mere fact that the rents are known to be paid to an estate agent, according to the usual practice, affects the purchaser with no notice at all.

Barnhart v. *Greenshields*, (1853) 9 Moo. P. C. 18, and *Knight* v. *Bowyer*, (1857) 23 Beav. 609; (1858) 2 De G. & J. 421, followed.

Mumford v. *Stohwasser*, (1874) L. R. 18 Eq. 556, not followed. HUNT *v.* LUCK **Farwell J. 45**

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—— Disqualification — Purchaser of forfeited shares—Disqualified from voting whilst calls remain due from original holder
See COMPANY. 14. **184**

—— Show of hands—Declaration of chairman that resolution is carried—"Conclusive evidence" - - - - **518**
See COMPANY. 7.

WARRANTY—Attorney innocently acting under forged power—Liability to third party Implied warranty of authority - **652**
See PRINCIPAL AND AGENT. 2.

WIFE.
See HUSBAND AND WIFE.

WILL—*Absolute Gift—Gift over on a Compound Event—Perpetuity—Remoteness—Splitting Gift over — Cutting down absolute Gift—Settlement—Intestacy—Construction of Will.*

A testator who died in 1852 gave his residuary estate, which consisted wholly of personalty, to trustees in trust for his wife for life, and after her death (which happened) to be divided into five equal portions, which he allotted thus: "To S. D. (a married woman) I give two of such portions": and having allotted the remaining three-fifths in similar words to other persons, he directed that the two-fifths allotted to S. D. should remain in trust for her life for her separate use, and from and after her decease in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marriage if daughters; "but

in default of any such issue" such two-fifths to be divided among the children of C. payable to sons at twenty-five or to daughters at twenty-one or marriage.

S. D. died in 1899 without ever having had a child. At her death there were children of C., daughters, who had all obtained twenty-one or married:—

Held, by the Court of Appeal, affirming Byrne J., (1) that the whole gift over on the death of S. D. was void for remoteness, and could not be split up into separate contingencies so as to be construed as a gift over on one contingency —such as that of S. D. having no child—that might in itself be good as being within the limit of perpetuity; and (2), that upon the death of S. D. there was no intestacy as to the two-fifths, but that, by reason of the invalidity of the gift over on her death, the original absolute gift remained, and, upon her death, passed to her representatives.

Where there is an absolute gift followed by a settlement of the subject of the gift, but the trusts of that settlement for some reason wholly or partially fail, there is, so far as they fail, no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift.

Evers v. *Challis*, (1859) 7 H. L. C. 531, distinguished on the first point, and *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, on the second. *In re* HANCOCK. WATSON *v.* WATSON C. A. 482

2. —— *Absolute Gift or Estate for Life with Power of Appointment—Construction of Will.*

Testator by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, and also gave them certain personal estate. He gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his sons executors on her death. By a codicil, dated in 1898, he revoked his will and gave all his property to his wife," so that she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed" the whole or any part of his said property, then he declared that his said will should take effect as if his codicil had not been made; and he appointed his wife executrix of his codicil during her life:—

Held, that the wife took an estate for life only with a general power of appointment. *In re* SANFORD. SANFORD *v.* SANFORD - Joyce J. 939

3. —— *Accumulations—Direction to accumulate Income beyond Twenty-one Years—Residue—Tenant for Life—Construction of Will.*

The testator, who died in 1865, by his will gave two freehold houses to trustees, and directed them to apply the income arising therefrom at their discretion for the benefit of his daughter F. for life, and after her death he gave the premises, together with any surplus accumulation of rents that might not be applied for the benefit of F., upon trust for her children who should attain twenty-one, and in default of such children then

over. He gave his residue upon trust for certain persons for life with remainders over. F. died in 1900, at which time the trustees had in their hands a considerable sum representing the accumulated surplus rents:—

Held, that the accumulations beyond the period of twenty-one years from the testator's death were bad under the Thellusson Act, and fell into residue; and that the tenant for life of the residue was not entitled to the surplus rents themselves, but only to the income arising from the investment thereof.

Crawley v. *Crawley*, (1835) 7 Sim. 427; 40 R. R. 170, and *O'Neill* v. *Lucas*, (1838) 2 Keen, 313, followed.

In re Phillips, (1880) 49 L. J. (Ch.) 198, disapproved. *In re* POPE. SHARP *v.* MARSHALL Farwell J. 64

4. —— *Ademption — Special Testamentary Power of Appointment—Exercise of Power—Subsequent Compulsory Sale of Property subject to Power—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 23.

For the purposes of the question whether an appointment under a testamentary power has been adeemed by subsequent dealings with the appointed property, no distinction is to be drawn between general and special powers.

Gale v. *Gale*, (1856) 21 Beav. 349; *Blake* v. *Blake*, (1880) 15 Ch. D. 481; *Collinson* v. *Collinson*, (1857) 24 Beav. 269, and *In re Johnstone's Settlement*, (1880) 14 Ch. D. 162, considered and explained. *In re* DOWSETT. DOWSETT *v.* MEAKIN Farwell J. 398

5. —— *Forfeiture Clause—Gift of Income to A. for Life or until Alienation—Garnishee Order —Rules of Supreme Court*, 1883, *Order* XLV., *r.* 2.

By will personalty was bequeathed in trust to pay the income to A. for life "or until he attempts to alien, charge or anticipate the same . . . . or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," and then over. A judgment creditor of A. served the trustees, who had accrued income in their hands, with a garnishee order:—

Held, that the garnishee order did not operate as a forfeiture of A.'s life interest.

Bates v. *Bates*, W. N. (1884) 129, dissented from.

Sutton, Carden & Co. v. *Goodrich*, (1899) 80 L. T. 765, followed. *In re* GREENWOOD. SUTCLIFFE *v.* GLEDHILL - - Farwell J. 887

6. —— *Legacy—Gift by Appointment under a Power—Interest.*

A testatrix, having under her marriage settlement a general power of appointment over a sum of 5000*l.* and certain funds comprised in the 1st schedule thereto, appointed that the trustees should stand possessed of the sum of 5000*l.*, and "of such portion of the stocks and securities comprised in the 1st schedule of the said indenture as shall, with the sum of 5000*l.* or the securities representing the same, make up the sum of 9000*l.*," in favour of certain appointees:—

Held, that the appointment was a specific gift of a portion of the stocks and securities, and that

WILL—*continued.*

the appointees were entitled to the interest on the whole 9000*l.* from the death of the testatrix. *In re* MARTEN. SHAW *v.* MARTEN **Byrne J. 370**

7. —— *Mistake—Number of Legatees—Illegitimate Children — Presumption — Evidence of Intention.*

Bequest to the three children of A. born prior to her marriage. A. had in fact four such children in existence at the date of the will. The testator had acknowledged the paternity of the three younger children, but he was not the father of the eldest child:—

Held, that, in the absence of proof that the testator was aware of the eldest child's existence, the onus of which proof lay on that child, there was no presumption that he intended to include her in the gift.

Semble, if the testator had been aware of the actual number of children, direct evidence of his intention to benefit three particular children would have been inadmissible. *In re* MAYO. CHESTER *v.* KEIRL - - **Farwell J. 404**

8 —— *Partnership—Conversion into Company.—Exchange of Testator's Interest in the Business for Shares in the Company — Agreement by Executors—Jurisdiction to sanction.*

The Court has no jurisdiction to sanction an agreement by which executors and trustees propose to concur in converting into a limited company a business in which their testator was a partner, where, by the terms of the agreement, the testator's share in the business will be exchanged for shares and debentures which the executors and trustees are not authorized by the will to hold. *In re* MORRISON. MORRISON *v.* MORRISON - - - **Buckley J. 701**

9 —— *Perpetuity—Uncertainty—Gift to maintain Tomb "for the Longest Period allowed by Law"—"Until Twenty-one Years from the Death of the last Survivor of all Persons who shall be Living at my Death."*

Testatrix bequeathed the sum of 500*l.* New Consols to trustees, upon trust to apply the dividends thereof in maintaining and keeping in repair the tomb of her brother in Africa "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death":—

Held, that the gift was void for uncertainty.

Whether it was void as a perpetuity, *quære*. *In re* MOORE. PRIOR *v.* MOORE - **Joyce J. 936**

10 —— *Residuary Devise—Specific Devise—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.

A devise of the residue of, or the remainder of the freeholds, or of all other the freeholds of a testator is a good "residuary devise" within the meaning of s. 25 of the Wills Act, 1837, though it does not extend to copyholds.

There may be in the same will two good residuary devises, the one limited to freeholds, the other limited to copyholds.

A testator, who possessed several freehold houses at Wimbledon and two freehold houses at Kingston-on-Thames, devised one of the houses at Wimbledon to his son in fee. And he devised "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere" to other persons. The devise to the son became void because he attested the will:—

Held, that the second devise was a good residuary devise within s. 25, and that it included the house the devise of which to the son had failed.

Decision of Kekewich J., [1900] 2 Ch. 196, reversed.

In re Brown's Trusts, (1855) 1 K. & J. 522, and *Springett* v. *Jenings*, (1871) L. R. 6 Ch. 333, explained and distinguished. *In re* MASON. OGDEN *v.* MASON - - - **C. A. 619**

11 —— *Residue—Share of Residue—Gift over—Legacy out of Share—Lapse.*

A testator gave a share of residue to trustees upon the following trusts, namely, as to the sum of 4500*l.* part thereof, the sum of 2250*l.* to be held in trust for each of two persons A. & B. who should attain the age of twenty-one, and, as to the remaining part of the share, in trust for such of four persons, A., B., C., and D., who should attain the age of twenty-one, with a gift over of the share in default of such persons.

The residuary legacy to A. having lapsed by his death under twenty-one, and the remaining beneficiaries having attained that age:—

Held, that having regard to the gift over, which being intended to operate on the share as a whole was inconsistent with any partial failure of the trusts thereof, the gift of the remaining part of the share carried the lapsed residuary legacy to the remaining beneficiaries.

Skrymsher v. *Northcote*, (1818) 1 Swans. 566; 18 R. R. 142, doubted. *In re* PARKER. STEPHENSON *v.* PARKER - - - **Farwell J. 408**

12. —— *Shelley's Case, Rule in—Real Estate—Will—Construction.*

Testator gave certain freehold estates to trustees upon trust for management and to receive the rents and profits thereof, and after payment of necessary repairs and outgoings to pay thereout to each of his first eight cousins therein named the sum of 60*l.* per annum for their lives and then to pay the residue of such net rents and profits half-yearly to W. D. for his life, and from and after the respective deceases of the annuitants and W. D. upon trust to convey the said freehold estates, together with any accumulations of rents in the hands of the trustees, unto the right heirs of W. D.:—

Held, that the rule in *Shelley's Case*, (1581) 1 Rep. 93 b, applied, and that W. D. was entitled to the property in fee simple subject to the annuities. *In re* YOUMANS' WILL **Joyce J. 720**

13. —— *Shifting Clause—Limitations of Real Estates—Successive Life Estates—Exception of Eldest Son entitled to other Estates—Construction of Will.*

A shifting clause, or an exception in the nature of a shifting clause, in limitations of real estate must be strictly construed, and not according to the rule of construction which has been adopted in the case of provisions for children made by a parent or a person in loco parentis.

A testator in 1855 devised his real estates to the use of all and every the sons of his nephew Richard successively, for their respective lives,

WILL—*continued.*

"other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits" of the C. estates "after the decease of Richard as tenant for life or any greater estate or interest whatsoever."

In January, 1869, Richard and his eldest son, being then respectively tenant for life in possession and tenant in tail in remainder of the C. estates, disentailed those estates, and appointed them to trustees on trust for sale, and to hold the proceeds of sale on trusts under which the son took a beneficial interest, and the estates were accordingly sold by the trustees.

In 1875 the testator died. In 1899 the nephew Richard died:—

Held, that the eldest son of Richard was not by virtue of the exception contained in the will excluded from a life interest in the devised estates.

Decision of Cozens-Hardy J., [1900] 1 Ch. 795, reversed.

Collingwood v. *Stanhope*, (1869) L. R. 4 H. L. 43, explained. SHUTTLEWORTH *v.* MURRAY C. A. 819

—— Accumulations—Leaseholds—Insurance *See* ACCUMULATIONS. 697

—— Annuity—Duration—Annuity to wife "so long as she remains unmarried"—Death of wife unmarried - - - 412 *See* ANNUITY.

—— Charity, Gift to—Invalid bequest followed by gift of residue to charity - 715 *See* CHARITY. 1.

—— Domicil—Personal property—Settlement—Power of appointment—Will - 547 *See* CONFLICT OF LAWS.

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—— Limited power — Exercise by will — "Appoint, devise, and bequeath" 677 *See* POWERS.

—— Married woman—Invalid bequest—Assent of husband - - - - 624 *See* HUSBAND AND WIFE.

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WORDS—"All I have power to dispose of by this my will" - - - 424 *See* HUSBAND AND WIFE.

—— "Appoint, devise, and bequeath" - 677 *See* POWERS.

—— "Concealed Fraud" - - - 143 *See* LIMITATIONS, STATUTE OF.

—— "Creditor" - - - - 77 *See* COMPANY. 15.

—— "In fee" - - - - 945 *See* CONVEYANCE.

—— "Residuary devise" - - - 619 *See* WILL. 10.

—— "Tramways" - - - - 781 *See* CORPORATION. 2.

—— "User" - - - - 122 *See* PATENT. 2.

WRIT—Of attachment — Actual receipt — Evidence - - - - 447 *See* ATTACHMENT.

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